TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 545

THE CITY OF YONKERS, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF IRVIN SAUNDERS, OF "THE SAUNDERS TRADE SCHOOL FUND", PETITIONER,

vs.

WALTER F. DOWNEY, AS RECEIVERS OF THE FIRST NATIONAL BANK AND TRUST COMPANY OF YONKERS, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

Statement Under Rule 13.

This is an appeal by the defendant above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 5th day of August, 1938, in the above entitled case, in favor of the plaintiff, Walter F. Downey, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, against the defendant, The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund" in the sum of $2,485.69, together with interest thereon in the sum of $382.93 and costs in the sum of $50.93.

This action was commenced on April 23, 1936, by the original plaintiff herein, Arthur E. Muth, Receiver of the First National Bank and Trust Company of Yonkers, in liquidation, by the filing of a praecipe and the issuance of a summons. The summons and complaint, with proof of ser-

Statement Under Rule 13.

vice, were filed on May 2, 1936. The defendant filed an answer on July 21, 1936, which was amended by stipulation dated November 24, 1937. Walter F. Downey, having been appointed Receiver of the First National Bank and Trust Company in the place of Arthur E. Muth on November 15, 1937, he was by an order dated November 26, 1937, substituted as plaintiff in the place and stead of said Arthur E. Muth.

On January 5, 1938, this case was tried before Judge John Knight without a jury, a jury having been waived by stipulation on the record. Judge Knight reserved decision.

On June 8, 1938, Judge Knight rendered his decision in favor of the plaintiff.

On July 18, 1938, findings of fact and conclusions of law, as requested by the plaintiff, were signed by Judge Knight and on the same day Judge Knight signed a memorandum containing his rulings upon the defendant's requests for findings of fact and conclusions of law. The findings and memorandum were filed on or about July 29, 1938.

On August 3, 1938, costs were taxed in the sum of $50.93 and on August 5, 1938, judgment was entered by the plaintiff against the defendant in the sum of $2,485.69, together with interest thereon in the sum of $382.93.

Thereafter defendant made a motion to determine the applicability of the new Rules of Civil Procedure for guidance on the appeal herein. Judge Knight determined under Rule 86 that the application of the new rules would not be feasible and would work injustice in this case. Accordingly the former practice has been followed herein except that in addition appeal was taken under the new procedure out of abundant caution.

On October 31, 1938, an appeal allowed defendant from the said judgment of August 5, 1938.

There was no arrest, attachment or reference herein.

Plaintiff has appeared through the proceedings in the above entitled action by Benjamin W. Moore, Esq., and the defendant has appeared by Leonard G. McAneny, Esq., Corporation Counsel of the City of Yonkers.

Docket Entries.

4/23/36	Filed Praecipe and issued summons.
5/ 2/36	Filed summons and complaint and affidavit of service 5/1/36.
7/21/36	Filed stipulation extending time to answer to 7/23/36.
7/21/36	Filed answer of Defendant City of Yonkers.
11/20/37	Filed note of issue. Motion to substitute party plaintiff. Returned 11/26/37.
11/26/37	Filed affidavit and notice of motion to substitute Receiver as party plaintiff. No opposition. Motion granted, Mandelbaum, J.
11/26/37	Filed order substituting Receiver as party plaintiff, Mandelbaum, J.
1/ 5/38	Before Knight, J. Trial began. Jury waived by stipulation. Concluded. Decisions reserved.
6/13/38	Filed opinion No. 11465. Plaintiff to recover $2,485.69, Knight, J.
7/29/38	Filed finding of fact and conclusions of law, Knight, J.
7/29/38	Filed Defendant's request for findings and conclusions.
7/29/38	Filed opinion No. 11,596 on Defendant's request for findings and conclusions, Knight, J.

Docket Entries.

	8/ 3/38	Filed bill of costs taxed at $50.93.
	8/ 5/38	Filed Judgment No. 38413 for plaintiff for $2,919.55.
	9/26/38	Filed note of issue. Motion to determine. Civil Rules 46 and 37. Returned 10/4/38.
	10/22/38	Filed affidavit and notice of motion to determine. Civil Rules 46 and 73.
	10/22/38	Filed affidavit in opposition to motion to determine. Civil Rules 46 and 73.
11	10/22/38	Filed order denying motion to determine. Civil Rules 46 and 73.
	10/28/38	Filed order extending time to file bill of exceptions to 1/7/39, Conger, J.
	10/29/38	Filed exceptions, Knight, J.
	10/31/38	Filed petition and order allowing appeal, Bondy, J.
	10/31/38	Filed Assignment of Errors.
	10/31/38	Filed cost bond on appeal Great American Indemnity Co.
12	11/ 1/38	Filed notice of appeal and mailed copy to Benjamin W. Moore, 11/2/38.
	11/ 3/38	Filed citation—Ret. 30 days.
	11/22/38	Filed bill of exceptions and settlement of same (Knight).

Summons.

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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund".

L. 64, Page 75.

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To the Above-Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

15

WITNESS, the Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 23rd day of April, A. D. 1936.

CHARLES WEISER,
Clerk.

(SEAL)

BENJAMIN W. MOORE,
Plaintiff's Attorney.
Office and Post Office Address:
30 South Broadway, Yonkers,
New York.

16

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

17

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

Plaintiff complaining of the defendant, by his attorney, Benjamin W. Moore, alleges:

First.—That at all times since the 30th day of September, 1929 the First National Bank and Trust Company of
18 Yonkers has been a national banking corporation organized and existing under the laws of the United States with its principal place of business in the City of Yonkers, County of Westchester and State of New York.

Second.—That the defendant was at all times hereinafter mentioned and now is a municipal corporation duly organized and existing under the Laws of the State of New York, and that the defendant was at all times hereinafter mentioned and now is the duly acting trustee of "The Saunders Trade School Fund" having been appointed

thereto under the last Will and Testament of Irvin Saunders, deceased.

Third.—That on the 4th day of March, 1933 said First National Bank and Trust Company of Yonkers, New York suspended all transactions and business and thereafter never reopened in the regular course of business, and that on the 20th day of March, 1933 the Comptroller of the Currency of the United States acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States on March 9, 1933 duly appointed Percival W. Trudeau as Conservator of said First National Bank and Trust Company of Yonkers, and said Conservator, under the direction of said Comptroller, on said March 20, 1933, duly took possession of the books, records and assets of every description of said First National Bank and Trust Company of Yonkers, New York and continued to act as such Conservator until July 24, 1933: that Louis D. Rossire was on said July 24, 1933, by like authority, duly appointed by said Comptroller of the Currency as successor Conservator of said First National Bank and Trust Company of Yonkers, New York, in the place and stead of said Percival W. Trudeau; and that said Louis D. Rossire duly qualified as such Conservator and continued to act as such until the 23rd day of January, 1934: that the said Comptroller of the Currency had become satisfied of the insolvency of said First National Bank and Trust Company of Yonkers, New York and that the plaintiff was on that day duly appointed by said Comptroller of the Currency as Receiver of the said First National Bank and Trust Company of Yonkers, New York to liquidate said bank as of the said 4th day of March, 1933, and that the plaintiff has duly qualified and is now acting as such Receiver.

Fourth.—Upon information and belief that from the said 30th day of September, 1929 the defendant has main-

tained certain of the funds of "The Saunders Trade School Fund" in a deposit account in said Bank under the caption "Saunders Trade School Trustees Fund Account" and on the said 4th day of March, 1933 the credit balance of said deposit account, together with accrued interest computed to the said 4th day of March, 1933, amounted to the sum of $4,971.38.

Fifth.—Upon information and belief that from the said 30th day of September, 1929, and on divers dates during the existence of said deposit account, maintained as aforesaid by the defendant, said First National Bank and Trust Company of Yonkers, New York pledged with and to the defendant, as security for the repayment of the indebtedness evidenced by said deposit account and as security for the repayment of the indebtedness evidenced by certain other deposit accounts, certain of the assets of the said Bank consisting of various and sundry bonds, a schedule of which is attached hereto, marked Exhibit A, and made a part of this complaint, and that the pledge of assets so made to secure the repayment of the indebtedness evidenced by the deposit account maintained as aforesaid by the defendant was unlawful, illegal, *ultra vires*, null and void.

Sixth.—Upon information and belief that on divers dates from the said 20th day of March, 1933 to or about the 16th day of December, 1933 all of the aforesaid assets so pledged with the defendant were recovered from the defendant by payments on account of all the aforesaid deposit accounts and on the 4th day of May, 1933 the deposit account maintained as aforesaid by the defendant was paid out in full.

Seventh.—That under date of December 16, 1933 there was made available to all creditors of the said Bank a first

dividend of 40% of the amount of their deposits at the time of the Bank's suspension.

Eighth.—That the said payment referred to in paragraph marked "Sixth" of this complaint on account of the deposit account maintained by the defendant as aforesaid were not ratable with and proportionate to the said dividend made available to the other creditors of the said Bank and was unlawful, illegal, *ultra vires,* null and void.

Ninth.—That there is now justly due and owing from the defendant to the paintiff the sum of $2,982.83 representing the difference between the said 40% dividend and the said payment totalling $4,971.38.

Tenth.—That no part of said sum has been paid although payment thereof has been duly demanded.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $2,982.83, with interest thereon from the 4th day of May, 1933, besides the costs and disbursements of this action.

BENJAMIN W. MOORE,
Attorney for Plaintiff,
Office & P. O. Address:
30 South Broadway,
Yonkers, New York.

Schedule A, Annexed to Complaint.

Description of Assets Pledged	Face Value
Fourth 4½ Liberty Loan Bonds	$ 40,000.00
Town of Cortlandt, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4¼	15,000.00
State of Arkansas, 4½s, due 1942	50,000.00
Butte, Montana, 6s, due 1941	15,000.00
Charlotte, North Carolina, 4½s, due 1934	5,000.00
Galveston, Texas, 5s, due 1933-1935	12,000.00
Town of Greenburgh, New York, 4½s, due 1946	15,000.00
Town of Greenburgh, New York, 4½s, due 1953	5,000.00
Town of Greenburgh, New York, 4½s, due 1954	1,000.00
Town of Huntington, Long Island, 4½s, due 1938	2,000.00
Town of Huntington, Long Island, 4½s, due 1945	2,000.00
Town of Huntington, Long Island, 4½s, due 1946	7,000.00
County of Jefferson, Alabama, 5s, due 1947	15,000.00
State of Louisiana, 4¾s, 1973	10,000.00
State of Louisiana, 4½s, due 1953	5,000.00
New Orleans, 4½s, due 1956	5,000.00
City of New York, 4½s, due 1965	10,000.00
Norfolk, Virginia, 4½s, due 1935	10,000.00
Norfolk, Virginia, 4½s, due 1935	15,000.00
State of Oregon, 5½s, due 1937	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1938	2,500.00
State of Oregon, 5½s, due 1945	2,500.00

Schedule A, Annexed to Complaint. 31

State of Oregon, 5½s, due 1945	$ 2,500.00
State of Oregon, 5½s, due 1946	2,500.00
City of Orlando, Florida, 5½s, due 1952	25,000.00
Portsmouth, Virginia, 5s, due 1954	10,000.00
City and County of San Francisco, 5s, due 1945	10,000.00
Village of Sea Cliff, New York, 5s, due 1933	1,000.00
State of South Dakota, 5s, due 1938	15,000.00
Winston-Salem, North Carolina, 4¾s, due 1936	14,000.00
Canadian, Int. Paper, 6s, due 1949	25,000.00
Comm. of Kentucky, 4½s, due 1950	50,000.00
Town of Lyndhurst, 5½s, due 1934	55,000.00
State of New Mexico, 6s, due 1935	25,000.00
Bay City, 4s, due 1935	3,000.00
Seattle, Washington, 5s, due 1934	6,000.00
Seattle, Washington, 5s, due 1940	2,000.00
Teaneck, New Jersey, 4½s, due 1934	25,000.00
Union, 6s, due 1934	25,000.00
Ohio Public Service, 6s, due 1953	30,000.00
South Bay Cons. Water Co. 5s, due 1950	10,000.00
Laclede Gas Light Co. 5½s, due 1935	5,000.00
Total Face Value	$692,000.00

32

33

(Duly verified by Arthur E. Muth on May 1, 1936.)

34

Answer as Amended by Stipulation, Dated November 24, 1937.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

35 *against*

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64, Page 75.

Defendant, by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, for its answer to the plaintiff's complaint:

36

First.—Denies each a d every allegation of said complaint in paragraphs numbered "Eighth," "Ninth" and "Tenth."

Second.—Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs of said complaint numbered "Third" and "Seventh."

Third.—Denies each and every allegation of said complaint in paragraph numbered "Fifth," in so far as it is alleged that the pledge of assets made to secure the repay-

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ment of the indebtedness evidenced by the deposit account maintained by the City of Yonkers was unlawful, illegal, ultra vires, null and void. Further denies that the schedule as set forth and marked Exhibit A is a correct list of the securities pledged with the City of Yonkers on or about the 4th day of March, 1933, in that the following bonds on or about that day, as listed in Exhibit A, were not in possession of the said City:

Fourth 4½ Liberty Loan Bonds	$40,000.00
Town of Cortland, New York	37,000.00
City of New York, Corp. Stock	10,000.00
Town of Tonawanda, Sewer Bonds	45,000.00
City of Yonkers, School Bonds	10,000.00
United States Fourth Liberty Loan Bonds, 4½%	15,000.00

38

As a first, separate and complete defense, the defendant further alleges:

Fourth.—That upon information and belief, that on or before the 4th day of March, 1933, the First National Bank and Trust Company of Yonkers had the authority to pledge its assets to secure public money in the State of New York.

39

Fourth-A: Denies each and every allegation contained in the paragraph of the Complaint numbered "Sixth."

Fifth.—That prior to the 3rd day of March, 1933, the said First National Bank and Trust Company of Yonkers pledged certain securities with the City of Yonkers as security for the repayment of its deposits by the said bank, as more clearly shown by plaintiff's "Exhibit A," except as hereinbefore denied.

40 *Answer as Amended by Stipulation, Dated November 24, 1937.*

Sixth.—That the said deposit of the City of Yonkers was a public fund of the said City.

As a second, separate and complete defense, the defendant further alleges:

Seventh.—Upon information and belief, that on or about the 4th day of March, 1933, the City of Yonkers held as security for its deposits negotiable bonds in the sum of
41 $535,000.00, of the First National Bank and Trust Company of Yonkers.

Eighth.—That, upon information and belief, there was on deposit on the 4th day of March, 1933, to the credit of the City of Yonkers, as Trustee of the Saunders Trade School Fund, the sum of $4,971.32.

Ninth.—That, upon information and belief, prior to the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, voluntarily released all moneys of the said City of Yonkers to the said City.
42

Tenth.—That, upon information and belief, the said release of said City's deposits was made pursuant to instructions of the Comptroller of Currency of the United States or his deputies.

Eleventh.—That, upon information and belief, said City deposits were released only after an opinion was given to the Conservator, Percival W. Trudeau, by his attorney.

Twelfth.—That the said City of Yonkers, relying upon the voluntary return of all moneys of the said City, sur-

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rendered to the Conservator of the First National Bank and Trust Company of Yonkers the aforesaid securities in the sum of $535,000.00.

Thirteenth.—That the said payment by the Conservator and his successor was voluntary and without duress or fraud and cannot be recovered back.

Fourteenth.—That in consideration for the return of all moneys of the said City of Yonkers, the said City returned to the Conservator of the First National Bank and Trust Company bonds owned by the said Bank in the sum of $535,000.00 and were returned to the said Bank in full satisfaction and discharge of any claim of the plaintiff in the complaint mentioned and in view of all demands to that date.

44

As a third, separate and complete defense, the defendant further alleges:

Fifteenth.—That on or about the 2nd day of May, 1933, Percival W. Trudeau, as Conservator of the First National Bank and Trust Company of Yonkers, in consideration of the return of securities held by the City of Yonkers in the sum of $535,000.00, released the deposits of the said City of Yonkers, and that the said release of the deposits constituted a release of the defendant of and from all liability to the plaintiff for any and all claims of the plaintiff, Bank, against the defendant, City of Yonkers, including the alleged cause of action set forth in the complaint and against any and all claims in regard to said deposit which might thereafter arise against the defendant for and on account of anything done by the defendant prior to the date of the release of said moneys.

45

46 *Answer as Amended by Stipulation, Dated November 24, 1937.*

As a fourth, separate and complete defense, the defendant further alleges:

Sixteenth.—That the aforesaid payments to the City of Yonkers of its deposits were voluntary payments, and at the time of said payments, the First National Bank and Trust Company of Yonkers was not insolvent.

47 *As a fifth, separate and complete defense, the defendant further alleges:*

Seventeenth.—That the defendant, City of Yonkers, was appointed Trustee of the Saunders Trade School fund by a Will of Irvin Saunders, deceased, admitted to probate in the Surrogate's Court of Westchester County on the 19th day of March, 1909.

Eighteenth.—Upon information and belief, that pursuant to said Will, the proceeds of the income from Saunders Trade School Fund was to be used for the erection and maintenance of a trade school in the City of Yonkers, New
48 York.

Nineteenth.—On the 19th day of October, 1923, the Honorable Joseph Morschauser, Justice of the Supreme Court, Ninth Judicial District, duly made an order providing that all revenues from the said Saunders Trade School Fund should be paid over to the City of Yonkers and that the maintenance of said Saunders Trade School should be included in the annual estimate of revenues and expenditures of the said City of Yonkers, more fully shown by Defendant's Exhibit A, which is attached hereto and made a part hereof.

Answer as Amended by Stipulation, Dated November 24, 1937.

Twentieth.—That all moneys on deposit in the said First National Bank and Trust Company on March 4, 1933, were funds of the City of Yonkers and public moneys.

WHEREFORE, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

LEONARD G. McANENY,
Corporation Counsel,
Attorney for Defendant,
Office and Post Office Address:
City Hall,
Yonkers, New York.

Defendant's Exhibit A, Annexed to Answer.

(Same as Defendant's Exhibit B, printed at pages 63 to 66.)

(Duly verified by James E. Hushion on July 21, 1936.)

52

Bill of Exceptions.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

53 *against*

CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

BE IT REMEMBERED, that at a stated Term of the District Court of the United States for the Southern District of New York, on January 4, 1938, before the Honorable John Knight, United States District Judge for the Western District of New York, then sitting in and for the Southern District of New York, presiding, the following proceedings were had:

54

Appearances:

BENJAMIN W. MOORE, Esq., and MILTON L. ROMM, Esq., Attorneys and Counsel for Plaintiff.

LEONARD G. MCANENY, Esq., Corporation Counsel of the City of Yonkers, MORRIS ROSENWASSER, Esq., First Assistant Corporation Counsel, and HAROLD T. GARRITY, Esq., Assistant Corporation Counsel, Attorneys and Counsel for Defendant.

55

Mr. Moore: The jury in this case is waived.

The Court: The stenographer will note the stipulation then.

WALTER F. DOWNEY, the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. I pass you a paper, Mr. Downey, and ask you if you can identify that paper (handing)? 56

Mr. McAneny: The answer is yes or no.

A. Yes.

Mr. Moore: I ask to have the paper marked for identification.

(Marked Plaintiff's Exhibit 1 for identification.)

Mr. McAneny: May I see that?

Mr. Moore: Yes (handing). I am going to offer this in evidence. It is the appointment of Mr. Trudeau.

57

Mr. McAneny: I object to a statement as to what this is, and I object to it on the ground that it is incompetent, irrelevant and immaterial and not binding upon the defendant in this action. The question of insolvency is a question of fact, and without production of evidence of insolvency that this certificate which is now being offered has no force or effect upon the defendant in this action. I think it is not properly presented in view of the fact that the person purported to be appointed is not produced in court for examination and cross examination. That is not binding upon this defendant.

58 *Walter F. Downey, Plaintiff—Direct.*

Mr. Moore: In our complaint we allege that the First National Bank and Trust Company of Yonkers suspended all transactions on March 4, 1933, for the transaction of business and thereafter it never reopened in the regular course of business until on the 20th day of March the Comptroller of Currency of the United States, acting under and pursuant to the Bank Conservation Act enacted by the Congress of the United States, on March 9th duly appointed Percival W. Trudeau a Conservator of said First National Bank and Trust Company of Yonkers. That
59 is denied in the answer. I am offering this as proof of Mr. Trudeau's appointment.

The Court: Objection overruled.

Mr. McAneny: I take an exception. It seems to me where an allegation is made that an individual who is now alive and can be produced is assuming a legal position with respect to the plaintiff that that person should be produced if there is going to be any probity to the position he has taken in this case.

As far as the National Banking Act is concerned, that Act in itself or any action taken under that Act
60 does not as a matter of fact establish insolvency with respect to any national bank or any other institution upon which such a certificate is issued; and therefore that this evidence now offered is not the best evidence and is not the proper evidence and is not in any sense binding upon these defendants.

The Court: Objection overruled; exception to the defendant.

Mr. McAneny: Exception.

Mr. Moore: I offer it in evidence.

(Plaintiff's Exhibit No. 1 for identification received in evidence.)

Mr. Moore: I ask to hand this paper to the witness.

Q. Can you identify that paper, Mr. Downey? A. Yes.

Mr. Moore: May I have that marked for identification.

(Marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Moore: I offer this in evidence (handing to Mr. McAneny). 62

Mr. McAneny: I object to the introduction of these documents.

Mr. Moore: I offer this in evidence. It is the appointment of Mr. Rossire as second Conservator, a certified copy of it.

Mr. McAneny: I offer the same objection to the introduction of this document in evidence or to its consideration in the case as I did to Plaintiff's Exhibit 1. I think it constitutes no evidence of insolvency of this institution.

The Court: Objection overruled.

Mr. McAneny: Exception. 63

(Plaintiff's Exhibit No. 2 for identification received in evidence.)

Q. I show you another paper, Mr. Downey, and ask you if you can identify that paper? A. Yes.

Mr. Moore: May I have that marked for identification?

(Marked Plaintiff's Exhibit No. 3 for identification.)

64 *Walter F. Downey, Plaintiff—Cross.*

Mr. Moore: I offer in evidence certified copy of the January 23, 1934 appointment of Arthur E. Muth.

(Plaintiff's Exhibit No. 3 for identification received in evidence.)

Mr. McAneny: I do not object to that, but that was an action that took place after the transactions involved in this case are concerned.

Mr. Moore: I offer in evidence a certified copy of the appointment of Walter F. Downey as Successor Receiver to Arthur E. Muth. It is dated the
65 15th day of November, 1937. Any objection?

Mr. McAneny: No, I do not object to that.

(Marked Plaintiff's Exhibit No. 4.)

Q. Mr. Downey, have you qualified as Receiver of the First National Bank and Trust Company of Yonkers, New York? A. Yes.

Q. You are now acting as such Receiver? A. Yes.

Q. Are you in charge of the liquidation of the bank? A. Yes.

Q. Was the first dividend of 40 per cent made available
66 to the general depositors on December 16, 1933? A. Yes.

Q. Was a second dividend of 10 per cent made available to the general depositors on November 3, 1937? A. Yes.

Mr. Moore: You may examine.

Cross examination by Mr. McAneny:

Q. When did you first become connected with the bank? A. At the close of business November 15, 1937.

Q. The statements that you have made in this case are not based upon your personal knowledge, are they? A. Just what do you mean, Mr. McAneny?

Q. I mean to say that they do not come under your observation in any sense as an official of the bank?

Mr. Moore: You mean as to the two dividends?

Mr. McAneny: Yes.

Mr. Moore: He is the liquidator of the bank. He has qualified as receiver.

Mr. McAneny: I am asking him a question as to the circumstances.

Q. In other words, this statement was made from records which you have examined after you were appointed 68
receiver? A. Relative to the two dividends, Mr. McAneny?

Q. Yes. A. Yes, and correspondence.

Q. That is correct? A. Yes, sir.

Mr. McAneny: All right. That is all.

Mr. Moore: That is all.

(Witness excused.)

John B. Power, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows: 69

Direct examination by Mr. Moore:

Q. Mr. Power, what is your present employment? A. Clerk in the employ of the Receiver of the First National Bank and Trust Company of Yonkers, New York, in Liquidation.

Q. Were you an employee of the First National Bank and Trust Company of Yonkers? A. Yes.

Q. For how long? A. Since April 1, 1929.

Q. What position did you hold there? A. Assistant cashier.

70 *John B. Power, for Plaintiff—Direct.*

Q. Did you continue in the employment of the Conservators and of the Receivers? A. Yes.

Q. Do you recall March 4, 1933? A. Yes.

Q. What day of the week was that? A. Saturday.

Q. Was the bank open for any kind of business on that day? A. No.

Mr. Moore: I am going to offer in evidence these two proclamations of the Governor. I offer in evidence in this case two proclamations of the Governor, one dated March 4th and one dated March 6th,
71 1933.

(Marked Plaintiff's Exhibits Nos. 5 and 6.)

Mr. Moore: May I see the Saunders Trade School ledger?

Q. Mr. Power, I show you a book. Can you identify that book? A. Yes.

Q. What have you there? A. This is the deposit account of The Saunders Trade School, Trustee Fund Account.

Mr. Moore: I want to have that marked for identification.

72

(Marked Plaintiff's Exhibit No. 7 for identification.)

By the Court:

Q. What page is that? A. It has no page number.

Q. What is the page? A. It has no page number.

By Mr. Moore:

Q. Was Plaintiff's Exhibit 7 marked for identification records made in the regular course of the bank's business? A. Yes.

John B. Power, for Plaintiff—Cross. 73

Q. Was it the regular course of the bank's business to have those records made on the day when the transaction described in them occurred? A. Yes.

Mr. Moore: I offer this in evidence.

Mr. McAneny: May I cross examine him on that?

Mr. Moore: Yes, you can cross examine on it. Is there any objection to that going into evidence?

Mr. McAneny: No.

(Plaintiff's Exhibit No. 7 for identification received in evidence.)

74

Mr. Moore: That is all.

Cross examination by Mr. McAneny:

Q. How was that account headed in the ledger, Mr. Power? A. Just a second. Saunders Trade School Trustee's Fund Account.

Q. How many debit items are there? A. Since what period?

Q. During the period of the book that was put in evidence.

Mr. Moore: March 3rd.

75

A. One debit item.

Q. Was that debit entry made from this check that I now show you? A. Yes.

Q. How is that check signed? A. It is signed "James J. Hushion, Comptroller; G. W. Klein, Jr., Treasurer." The check is imprinted "Saunders Trade School Trustee Fund Account."

Q. Where? A. On the side of the check.

Q. That is not over their signature? A. No.

Q. Do you know the signatures of those two gentlemen? A. Yes.

76 *John B. Power, for Plaintiff—Cross.*

Q. Mr. Hushion and Mr. Klein? A. Yes.

Q. Those are their signatures? A. Yes.

Q. What does that check indicate on the reverse side as to when it was paid? A. When it was paid?

Q. By the bank, yes. A. May 4, 1933.

Q. Can you tell us to whom that check is made out? A. Saunders Trade School Fund.

Q. It was made to the Saunders Trade School Fund itself? A. Yes.

Q. That was really a transfer, was it not? A. Yes.

77 Q. Does it show where that was deposited? A. Yes.

Q. What does it show? A. Central National Bank of Yonkers.

Mr. Moore: I object to that as incompetent, irrelevant and immaterial, and move to strike out the answer.

The Court: Overruled.

Mr. Moore: Exception.

The Court: It appears from the check itself.

78 Q. How long have you been connected with the First National Bank and Trust Company? A. Since October 1, 1929.

Q. Prior to that by whom were you employed? A. First National Bank of Yonkers.

Q. Your employment continued there after the merger of the bank; is that correct? A. Yes.

Mr. McAneny: That is all.

Mr. Moore: That is all.

(Witness excused.)

CARL H. VANVICK, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Moore:

Q. Mr. Vanvick, are you employed by Walter F. Downey as Receiver of the First National Bank and Trust Company of Yonkers? A. Yes, sir.

Q. In what capacity? A. Auditor in charge of the books and records and matters pertaining to the claims.

Q. How long have you been the auditor in the receivership? A. Since April 16, 1934. 80

Q. Are you familiar with the ledgers and records of the bank? A. Yes.

Q. Do the bank records show a deposit account maintained under the caption "Saunders Trade Institution" since September 30, 1929? Have you the 1929 books there? A. No.

Q. Do the records show an account in the name of the Saunders Trade School Fund in March, 1933, March 3, 1933? A. Yes; "Saunders Trade School Trustee Fund Account."

Q. Was that account an interest-bearing account? A. Yes. 81

Q. What was the balance together with the accrued interest at the close of business on March 3, 1933? A. $4,971.38.

Mr. McAneny: You might change that question to conform to my previous objections.

Q. As of March 3, 1933. I am leaving out "at the close of business on that day."

The Court: What does it show? What is the balance?

The Witness: $4,971.38.

82 *Carl H. Vanvick, for Plaintiff—Direct.*

Q. When did the first withdrawal from the account occur after March 3, 1933? A. May 4, 1933.

Q. How much was withdrawn from the account on that date? A. $4,971.38.

Q. What is the interest due on the withdrawal?

Mr. McAneny: I object to that question, "What is the interest due," on the ground——

The Court: He may state the amount of interest.

Q. On that account what is the amount of interest due
83 down to date?

Mr. McAneny: That he computes.

Q. (Continuing) Yes. Computed as you compute it? A. $904.42.

Mr. McAneny: It is understood that the question is what is the amount of interest as you compute it; is that so?

Mr. Moore: Yes.

Q. Will you tell us on what basis you calculate the interest? A. Interest at 6 per cent on $4,971.38 from May 4,
84 1933 to December 16, 1933; then interest on 60 per cent or $2,982.83 from December 16, 1933 to November 3, 1937; then interest on 50 per cent or $2,485.69 from November 3, 1937 to January 3, 1938.

Q. What is the total amount of the interest computed, as you have computed it? A. $904.42.

Mr. Moore: That is all.

Mr. McAneny: No questions.

Mr. Moore: Plaintiff rests.

The Court: What is the amount you show——

Mr. Moore: The amount?

85

The Court: It shows the amount deposited and the amount withdrawn.

By Mr. Moore:

Q. What is the amount due on the account as you figure it out? Can you give that? A. $2,485.69.

The Court: I do not see how you make that computation. You said there was a balance on May 3, 1933 of $4,971.38; May 4th that same amount was withdrawn.

86

Q. Will you tell us how you figure it?

The Court: How do you make that $904?

Q. Tell us how you figured it out again.

The Court: Unless my figures are wrong.

A. Interest of $904.42 was arrived at by the——

The Court: I understand that. You have explained how it is arrived at. What I want to know is what the balance in that account was?

87

The Witness: On March 3, 1933?

The Court: $4,971.38.

The Witness: That is right.

The Court: That was withdrawn?

The Witness: Yes.

The Court: It was paid, $4,971.38, the full amount, back to the City?

The Witness: Yes.

The Court: In May, 1933, the interest computation is $904.42.

The Witness: It is based upon the dividends that were declared.

88 *Motion to Dismiss the Complaint.*

The Court: 40 and 10 per cent?

The Witness: 40 per cent on December 16, 1933, and 10 per cent on November 3, 1937.

The Court: The amount claimed would be half of the $4,971.38, plus the interest?

Mr. Moore: Plus the interest, that is correct.

Q. That is the way you figured it, Mr. Vanvick? A. Yes.

Mr. Moore: Plaintiff rests.

Mr. McAneny: I move to dismiss the complaint
89 on the ground that the plaintiff has set forth and proved no facts sufficient to constitute a cause of action in this proceeding. There was absolutely no proof of insolvency. Furthermore, under the existing law and decisions with respect to a situation such as this, these moneys were paid out by the bank in due course, apparently, and there has been absolutely no demand ever made for the return of these moneys at any time. Certainly on that point alone the plaintiff has failed to make out a case, inasmuch as Section 244 of the Second Class Cities Law and Section 64 of that Law, and other laws applicable to
90 the City of Yonkers, require that before any claim or any judgment can be entered against the City a claim must be duly filed in accordance with the provisions of those laws.

The case as it exists is simply a case of a bank having to make payments, not to the depositor, but to outside parties, and having honored the checks, having never made any demand for the return of the money, and having shown no reason for such return so far as this defendant is concerned, in view of the fact that the plaintiff is demanding the return of the moneys apparently on the ground of insolvency. I do not know of any other grounds. And having

failed to prove insolvency, the plaintiff is out of court on that point.

I therefore ask that your Honor dismiss the complaint.

The law also requires, the State Law, notice of intention to sue, and that action must be commenced within one year after such notice is filed.

The Court: What do you say on the question of notice?

Mr. Romm: Our position is that the sections cited by counsel for the City do not refer to a claim of 92
the kind in suit. They refer more specifically to claims for work done for the City, personal injury accidents, property suits, and so forth, and not a claim of the character we are suing on.

The Court: They do specify the particular nature of the claims?

Mr. Romm: As I recall it—I have not read those sections within recent times—it might be worth while to look at them, if your Honor sees fit to do so.

The Court: I will see what the defendant claims as to that. What is the provision as to the presentation of claims?

Mr. Rosenwasser: Section 244 of the Second 93
Class Cities Law of the State of New York reads as follows:

(Omitted for brevity.)

That is all from Section 244.

Then there is Section 64, entitled (reading):

(Omitted for brevity.)

Mr. Romm: As to Section 244 of the Second Class Cities Law, which was read by Judge Rosenwasser, it seems apparent from a reading of it that

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that specifically applies to injuries to persons or property arising from negligence.

The Court: That section does not apply. How about 64?

Mr. Romm: The last one, Section 64 of the Second Class Cities Law, that does not apply to the plaintiff at all, your Honor, because it states, in substance, that a claim must be filed with the proper bodies or officers of the City after the claim has been approved, or, rather, after the claim has been approved by a head of the department or officer of
95 the city who hired the claimant. In other words, by those words it could not possibly apply to the plaintiff in this case, because manifestly there is no officer or head of any department in the City of Yonkers who would approve our claim so we could file it with the proper authorities. That section applies to situations where a man does work of some kind for the City of Yonkers or supplies material to it.

And, further, you see that this amounts to a failure to file a claim by giving notice, which is for
96 the first time stated by the corporation counsel in his motion, has never been set up, and that is necessary to this suit. It is our position that it is well established that a defense of that kind must be affirmatively pleaded so it could be heard by the Court.

Mr. McAneny: The complaint alleges that there has been a due demand. That is denied absolutely, which gives an absolute issue on that point. There has not been any demand even proved in this case.

Mr. Romm: Letters have been sent.

Mr. McAneny: I move to strike that out.

The Court: What is that?

Mr. McAneny: I move to strike out the remark of counsel that letters have been sent.

Mr. Romm: And mailed to the defendants.

Mr. McAneny: Do not interrupt me.

Mr. Romm: I was trying to answer the Judge.

The Court: Let the Corporation Counsel proceed.

Mr. McAneny: You did allege due demand. It was denied. You have proved no demand whatever and, furthermore, you proved no due demand under the law. 98

The Court of Appeals has held that that provision which bases a claim against the city applies to every kind of action, legal or equitable. The case of Thomann *v.* The City of Rochester, 256, N. Y. 165 disposes of that question and the City cannot be held liable without such a claim except on a fixed claim, fixed by contract or a fixed salary or fixed in some way so that the comptroller might be mandamused to pay it; that on any claim upon which there is no fixed liability, upon which a mandamus would not lie, it is required by law that a claim be made.

No such claim has been made in this case and no demand whatsoever. I think if your Honor will read that case I just cited and others we are going to submit to you you will find that that is a fatal defect in the plaintiff's case. The proof of filing the claim is a condition precedent which does not require that it be set up affirmatively. That is one of the points upon which we argue. 99

We further argue that there has been no insolvency shown, as against the defendant in this action. No insolvency, under the National Banking Law, may be deemed to exist with reference to the ordinary transactions of a bank, that is to say, as between

the bank and its depositors. This money is in the bank and they may have closed down and paid it out. It is necessary that they show as a matter of fact that it was paid out while it was actually insolvent. We do not admit that the bank was ever insolvent or that it is insolvent today, as a matter of fact.

Furthermore, we move to dismiss on the ground that the plaintiff would not be entitled to recover anything without a tender back of the securities.

The Court: Would not it be better to withhold action on your motion?

Mr. McAneny: I think so, so that we can submit a brief on the law.

The Court: So we can dispose of these questions. It does involve a question of a claim and presentation of a claim. So I think it is better to withhold my decision on your motion for the present and hear the defendant's case. It probably won't be very long.

Mr. McAneny: You reserve decision?

The Court: Yes, I reserve decision.

Mr. McAneny: I would like to offer in evidence a stipulation with respect to the answer.

The Court: Paragraph 13.

(Marked Defendant's Exhibit A.)

Mr. McAneny: I would like to offer in evidence a copy of an order dated the 19th day of October, 1933 by Honorable Joseph Morschauser, Justice of the Supreme Court of the State of New York in an action entitled City of Yonkers and the Board of Education in the City of Yonkers, Plaintiff, *v.* Carl Sherman, as Attorney General of the State of New York.

Mr. Romm: Is it certified?

Mr. McAneny: No, we haven't had it certified. It is a correct copy.

Mr. Romm: I have never checked it up in court.

Mr. McAneny: Do you object to it on the ground that it is not certified?

Mr. Romm: Let us examine it.

Mr. McAneny: If you object, we will have to go and get it certified.

Mr. Moore: May I take about three or four minutes to read this over?

The Court: Yes. 104

Mr. Moore: I do not know whether the income provision of this order was put in the budget or not. I am not going to raise any question with Mr. McAneny about the certification of this order. Mr. McAneny and I have known each other too long. If he says it is a correct copy, I will take his word for it. I do not know how it is competent, relevant or material. I object to it on that ground. He started to read an order issued by Judge Morschauser back in 1933 of the Supreme Court of the State of New York.

Mr. Garrity: Back in 1911 a man by the name of Saunders died and left a fund of money to the City of Yonkers to set up and establish a trade school. That money up to 1924 was sufficient to run the school. In 1924 it was necessary for the City of Yonkers to include in their annual estimate sufficient funds to support the school and its teachers. By this order of Judge Morschauser the income from that particular fund was to be paid into the general city fund of the City of Yonkers. 105

Mr. Romm: The order shows the payment of the income from the Saunders Trade School Fund into the City. It states that in completing its annual

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budget fund an estimate of the income was included as an item of the estimated income from the Saunders Trade School Fund. But I do not know whether that was actually done.

Mr. McAneny: We will show it was.

Mr. Moore: Whether they observed all the terms of the order.

The Court: Objection overruled. You may examine it later on for any corrections.

Mr. Moore: Exception.

107 The Court: And move to strike it out if it appears to have any errors in it.

(Marked Defendant's Exhibit B.)

Mr. Garrity: We also offer in evidence a copy of a resolution of the Board of Estimate and Apportionment designating the First National Bank of Yonkers, the Yonkers Trust Company and the Bryn Mawr-Nepperhan National Bank to appear as bank depositories of city funds.

Mr. Moore: I object to it as incompetent.

Mr. McAneny: It is the same resolution that was offered before.

108 The Court: Objection overruled. Exception to the plaintiff. Received.

Mr. Moore: Exception.

(Marked Defendant's Exhibit C.)

Mr. Moore: It is not completed.

Mr. Romm: It was in the other two cases but not in this case.

Mr. McAneny: It is a matter of our defense or proof.

The Court: I think it is evidentiary. I think it should be received.

Mr. Moore: All right. Exception.

The Court: Exception to the plaintiff.

Mr. McAneny: Will counsel for the plaintiff concede that the First National Bank and the Yonkers Trust Company and the Bryn Mawr-Nepperhan National Bank was consolidated on September 30, 1929?

Mr. Moore: I will.

Mr. McAneny: Will counsel for the plaintiff concede that upon that consolidation all of the securities of the constituent banks held by the City of Yonkers as securities for deposits were turned over to the First National Bank and Trust Company and thereafter held by the City as security for its deposits in that bank?

Mr. Moore: I cannot consent to that because I do not know it to be a fact.

Mr. McAneny: I would like to read into the record Sections 69 and 70 of the Second Class Cities Law.

The Court: It is unnecessary to read that again. Let the stenographer copy it in the record.

Mr. Moore: I will stipulate that it be incorporated in the record.

The Court: Overruled.

Mr. Moore: With the same objection.

The Court: Objection overruled. Exception to the plaintiff.

Mr. Garrity: Second Class Cities Law of 1909, Chapter 55 as Amended:

(Omitted for brevity.)

112 *Stephen A. Roake, for Defendant—Direct.*

STEPHEN A. ROAKE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Roake, you hold a position with the City of Yonkers, do you not? A. Yes, sir.

Q. What is that? A. Assistant Cashier, Department of Finance.

Q. How long have you held that position? A. Since 1923 or thereabouts.

113 Q. You held that position under the City Treasurer of Yonkers up to what time? A. Up to December 31, 1933, when the office of City Treasurer was abolished.

Q. You are now assistant cashier in the Department of Finance? A. Yes.

Q. You have held that position continuously since the first date you mentioned? A. Yes, sir.

Q. And the City Treasurer is an elected city officer, is he not, or was? A. He was, yes.

Q. Have you before you a copy of the budget of the City of Yonkers for the year 1931? A. Yes, sir.

114 Mr. McAneny: I ask to have that marked in this case.

(Marked Defendent's Exhibit D for identification.)

The Court: Do you want to mark any particular pages?

Q. Is there any item in that budget or annual estimate under the caption "Saunders Trade School"? A. Yes.

Q. Will you read what that item is?

The Court: What page?

The Witness: Page 4, state of credits, that is, revenue, estimated revenue, Saunders Trade School Fund, $23,000.

Q. That was revenue derived by the city? A. The estimated revenue.

Q. That was an item in the annual budget? A. Yes.

Q. Will you take the budget of the City of Yonkers for 1932? Have you that before you? A. Yes.

Mr. McAneny: I ask to have that marked for identification. 116

(Marked Defendant's Exhibit E for identification.)

Q. Will you turn to the item in the budget referring to the Saunders Trade School and read what that states? A. 1932 budget, page 4, estimated revenue Saunders Trade School Fund, $22,000.

Q. Will you refer to the budget for the year 1933, budget of the City of Yonkers, and indicate or state what that budget states with reference to the Saunders Trade School?

Mr. McAneny: I ask to have that marked for identification. 117

(Marked Defendant's Exhibit F for identification.)

A. 1933 budget, estimated revenue, Saunders Trade School Fund, $23,000.

The Court: What page is that?

The Witness: Page 4.

Q. Will you turn to the exhibit which is marked Defendant's Exhibit D under the Board of Education and to a

118 *Stephen A. Roake, for Defendant—Direct.*

statement in there headed "Saunders Trade School," and state upon what page that is found? A. That is under the "Bureau of Trade Schools."

The Court: What page?

The Witness: 54.

Q. Department of Education? A. Department of Education.

Q. That is a part of that budget? A. Yes, sir.

Q. A part of the completed city budget? A. Yes.

119 Q. Does that refer to the Saunders Trade School? A. It refers to the Bureau of Trade Schools.

Q. Was the Saunders Trade School included in that Bureau? A. Yes. It does not so state here.

Q. But it is, as a matter of fact? A. Yes.

Q. I think there is only one trade school in the City of Yonkers. A. There is only one trade school.

Q. That is the Saunders Trade School? A. That is right.

Mr. McAneny: I offer it in evidence, offer in evidence the sheet in that exhibit which covers the Bureau of Trade Schools, as testified to by the witness.

120

The Court: As on page 55?

The Witness: Pages 54 and 55.

Mr. McAneny: I make the same offer with respect to the similar items in the Board of Education budget as enumerated in the annual estimates of the City for 1932 and 1933, which is Defendant's Exhibits E and F for identification, and ask to let the witness state upon what pages those are found.

Mr. Moore: Is this the same question with reference to the City's budget?

Mr. McAneny: Yes.

Stephen A. Roake, for Defendant—Direct. 121

The Witness: 1932 budget of the Board of Education, pages 55 and 56, include the appropriations for the Bureau of Trade Schools.

Q. That is in the 1932 budget? A. 1932 budget.

Q. In the 1933 budget?

The Court: You have already gone over this before.

Mr. Romm: Page 4, he said before.

The Court: The estimate is $22,000.

122

Q. To cover this income and these expenses? A. 1933 budget, pages 56 and 57, include appropriations for the Bureau of Trade Schools in the Board of Education.

Q. How much is that appropriation? A. The appropriation in 1933 entitled "Bureau of Trade Schools" $148,876.

Q. What was the appropriation for the other two years? Can you give us that? A. The 1932 appropriation of the Bureau of Trade Schools, $149,019.

Mr. Romm: Is that 1932 or 1931?

The Witness: 1931.

123

By the Court:

Q. The prior one was what? A. 1933.

Q. Estimated amount in 1932 for 1933? A. That is the estimate for 1932.

Q. The first one was for 1933? A. Yes.

Mr. Romm: What was the one for 1932 again, and on what page?

The Witness: Pages 56 and 57 include the 1932 appropriation for the Bureau of Trade Schools. The total of that Bureau is $149,019.

124 *Stephen A. Roake, for Defendant—Direct.*

By Mr. McAneny:

Q. You have the year 1931 there?

Mr. Moore: I do not know what the materiality of this is, and I will object to it and move to strike it out.

The Court: No, I will receive it.

Mr. Moore: Exception.

The Court: Yes, exception to the plaintiff.

125 A: The 1931 appropriation of the Bureau of Trade Schools, total amount of appropriation $144,590.50.

Mr. Romm: What page?

The Witness: The total is shown on page 55.

Mr. McAneny: Let these three extracts from those three budgets be given exhibit numbers.

The Court: Mark the pages.

Mr. McAneny: The pages have been marked for identification only, and I offer these pages in evidence, 1931, 1932 and 1933. Let them be given exhibit numbers, Exhibits D, E and F.

Mr. Romm: We want to examine them before

126 they go into evidence.

The Court: Mark them for identification.

Mr. McAneny: I have offered them in evidence.

Mr. Romm: You offered them to be marked for identification—they have been marked for identification.

Mr. McAneny: The defendant offers those pages in evidence.

The Court: The pages have been marked for identification. The plaintiff may examine them now. I think we better suspend. It is one o'clock.

Mr. McAneny: We will be a short time after recess.

The Court: We will suspend now until two o'clock.

(Recess to 2:00 p. m.)

AFTERNOON SESSION.

2:00 p. m.

STEPHEN A. ROAKE, resumed the stand.

128

Direct examination continued by Mr. McAneny:

Mr. McAneny: I offer these pages in evidence. Counsel for the plaintiff has looked them over.

Mr. Moore: No objection, Mr. McAneny, to them.

The Court: Received.

(Defendant's Exhibits D, E and F for identification received in evidence.)

Q. Mr. Roake, you handled these accounts in the First National Bank and Trust Company entitled "The Saunders Trade School Fund," didn't you? A. Yes, sir.

Q. You made deposits in that account? A. I did. 129

Q. Deposited cash and checks in that account? A. Yes, sir.

Q. Where did the checks and cash that you deposited in the account come from? Where did you receive them from? A. Interest from mortgages, interest on other investments, bonds, and so on.

Q. Interest from the capital fund of the trust estate? A. Yes, sir.

Q. The moneys in that account as of March 3, 1933, were from those sources, were they not? A. Yes, sir.

Mr. McAneny: That is all.

130 *Gustav W. Klein, Jr., for Defendant—Direct.*

Mr. Moore: No cross examination.

(Witness excused.)

GUSTAV W. KLEIN, JR., called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. McAneny:

Q. Mr. Klein, are you an officer of the City of Yonkers? A. I am.

131 Q. What position do you hold? A. Deputy Comptroller of the City of Yonkers, Department of Finance.

Q. How long have you held that position? A. Since January 1, 1934.

Q. Prior to that time what position did you hold? A. I was City Treasurer of the City of Yonkers.

Q. From when to when? A. From January 1, 1932, to December 31, 1933.

Q. The office of City Treasurer was abolished as of the latter date? A. As of December 31, 1933.

Q. Were you then appointed a Deputy Comptroller? A. Yes, sir; that is right.

132 Q. In the Department of Finance? A. That is right.

Q. The position you now hold? A. That is right.

Q. As City Treasurer of the City of Yonkers was it part of your duties and your position to handle the securities that were pledged to secure city deposits in banks? A. It was.

Q. Referring to the deposit of securities referred to in the complaint in this action as having been deposited with the City of Yonkers, did you have custody of those securities? A. I did with an officer of the bank, yes.

Q. As of March 3, 1933, what was the par value of those securities? A. $535,000.

Q. Have those securities been returned to the bank or its representatives? A. They have, with the exception of $1,000.

Q. Have you receipts for the return of those securities? A. I have.

Mr. McAneny: I offer these receipts in evidence. They are the same as we had in the other cases.

Mr. Moore: Let me see them.

(Documents handed to Mr. Moore.)

(Document consisting of six sheets marked Defendant's Exhibit G.) 134

Q. Were those securities of the par value of $535,000, as you have testified, segregated to any separate funds or accounts in the City's financial set-up? A. They were not.

Q. What was said by Mr. Trudeau or yourself at the various times that these securities were returned?

Mr. Moore: I object to that as incompetent, irrelevant and immaterial and a self-serving declaration.

The Court: Overruled; the same question as we had before. 135

Mr. Moore: Exception.

A. Mr. Trudeau and I had a conversation with reference to getting the money out of the bank, and he said that when I released the securities he would release the moneys. That is the way the accounts were cleaned out. As the balance dropped, we would return so much security.

Q. Do you recall the occasion upon which the check, Defendant's Exhibit B, was paid by the bank? Do you recall that circumstance? Will you look at that check? A.

136 *Gustav W. Klein, Jr., for Defendant—Cross.*

A check drawn on the Saunders Trade Trustee Fund for $4,971.38.

Q. Was anything said with regard to those securities when that amount was paid by the bank? A. Not to my knowledge.

Mr. McAneny: Is that check in evidence?

Mr. Garrity: I do not think it has been submitted yet.

The Court: It was referred to as Exhibit B.

Mr. McAneny: I will offer this check in evidence
137. at this time. It has been identified by Mr. Power.

Mr. Moore: No objection to it.

(Marked Defendant's Exhibit H.)

Q. Was that one of the payments upon which you returned securities? A. It might have been. I think on May 4th, the date that check was paid, I returned to the First National Bank, I think, $9,000 worth of securities.

Q. That payment was taken into your calculation? A. That is right.

Mr. McAneny: That is all.

138 *Cross examination by Mr. Moore:*

Q. Mr. Klein, was there any pledge agreement drawn up between the bank and you as treasurer or as deputy comptroller with reference to the deposit of securities with the City for the deposit of the fund of the City in the bank? A. Not to my knowledge.

Q. Where were those securities kept? A. Those securities were kept in the safe deposit box of the bank, boxes. There was more than one box.

Q. That was under the general control of whom? A. General control of the treasurer then and the officers of the bank.

Q. One could not get in without the other? A. That is right.

Q. You both had joint possession of the boxes? A. That is right.

Q. Was there any written pledge agreement? I have asked that before. A. I have no knowledge of it.

Q. Was there one? A. Not to my knowledge.

Mr. Moore: That is all.

Re-direct examination by Mr. McAneny:

140 Q. Mr. Klein, what was the arrangement which you, as Treasurer of the City of Yonkers, made or arranged by you as such Treasurer and the bank itself as to the deposit of these securities with you?

Mr. Moore: I object to that as calling for a conclusion of the witness.

The Court: He has asked what was said.

Mr. Moore: Will you read the question?

Q. (Read by the stenographer.)

The Court: Sustained as to form and calling for a conclusion.

141 Q. Was anything said by you to the officers of the bank at the time you made deposits in City accounts in the bank?

Mr. Moore: In the Saunders Trade School case, Mr. McAneny?

Mr. McAneny: No, I am talking about this whole $535,000.

A. Yes, at times, especially during tax collections when the deposits would run very heavily; at that season of the year I would call the bank up and ask them for more security to

142 *Gustav W. Klein, Jr., for Defendant—Re-direct.*

secure the deposits that were given, and they were placed with the others.

Q. This bank always gave you securities in excess of the actual City deposit in the bank? A. It ran about the same, yes.

Q. How long to your knowledge had this bank been giving security for deposits? A. When I first was Deputy City Treasurer—that was in 1936—that same arrangement was in effect and the same arrangement for operation at the time I was Treasurer and Deputy Treasurer.

143 Mr. Romm: We move to strike out the answer as not responsive. He was asked as to the plaintiff bank, and the answer is as to some other bank.

The Court: Yes. The plaintiff bank was not in existence in 1929.

Q. As to the constituent banks?

Mr. Romm: Objected to as incompetent, irrelevant and immaterial.

The Court: How is it competent, Mr. McAneny?

Mr. McAneny: It is competent to show that this bank had pledged assets for a number of years.

144 The Court: That already appears.

Mr. McAneny: I will withdraw that.

Q. Since the First National Bank and Trust Company became a consolidation of the other three banks, do you know what the situation then was with regard to their giving security to the City? A. The First National Bank, they held the same procedure as the other banks. When deposits in there accrued in excess of security, I called them up and they would always add additional security to the list we already had.

Q. How far did it run with respect to the First National Bank and Trust Company, that is, the merged bank? A. That same procedure was in effect on January 1, 1932, when I was treasurer.

Q. It ran during all the time that you were City Treasurer? A. That is right.

Mr. McAneny: That is all.

Re-cross examination by Mr. Moore:

Q. Mr. Klein, who would deliver these securities to you? A. Why, it was sometimes a young lady by the name of Miss Roberts in the First National Bank and then Miss Nadashy, I think it is. 146

Q. Was Miss Roberts an officer of the bank? A. Not to my knowledge.

Q. Was Miss Nadashy an officer of the bank? A. I think she was.

Q. What position did she hold, if you know?

Mr. McAneny: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McAneny: Exception. 147

A. I think she was assistant cashier.

Q. Were either of the women you have mentioned directors of the bank?

Mr. McAneny: I make the same objection.

The Court: If he knows.

Q. (Continuing) Do you know? A. I do not know.

Mr. McAneny: The plaintiff has made a pledge. That has been admitted.

The Court: He states he does not know.

148 *Motion to Dismiss the Complaint.*

Q. You came with the City after 1928, was it, beginning back in 1932? A. I was with the City in 1926 and 1927; then again in 1932.

Q. Beginning with 1928 and to 1932 you were not with the City? A. That is right.

Q. You do not know what happened in the time when you were not there? A. I have no knowledge.

Mr. Moore: That is all.

149 Mr. McAneny: The defendant rests.

I renew my motion to dismiss the complaint upon the grounds already stated, which are to the effect that so far as moneys that were paid out on these checks are concerned, there is no evidence of any insolvency of the bank.

Furthermore, that the moneys were public moneys within the intention and within the wording of Section 90 of the National Banking Law and that they were legally secured, and that any payment out of this account was secured in any manner and particularly in the manner covered by the testimony in this case showing a legal and 150 valid transaction binding upon the bank, the Conservators and Receivers.

On the further ground that there has been no demand made against anyone for the return of any of this money and there has been no service of any claim upon the officers of the City, as required by the laws of the State of New York.

It seems to me that viewing the whole circumstances in this case it would be iniquitous to claim or hold that these trustees who have acted within the law and who have received these moneys and deposited them in the national bank and being fully secured as to all their deposits, having

no profit whatever in this situation, acted merely as trustees and having in good faith drawn these checks and these checks having all been paid out by the bank without question, that now six years later we should be haled into court and told that these trustees are personally liable and must refund these moneys; it seems to me that the whole course of conduct of the trustees and the bank and the representatives of the bank would make such an act very inequitable. So far as I can see, it is absolutely legal.

The cases hold that the State of New York, and it is the practice of the state banks and other institutions or depositories to give securities for public money, and I believe that 152
the interpretation of Section 90 by the United States Supreme Court in the case just mentioned, McNair, Receiver, *v.* W. D. Knott, Treasurer, decided December 13, 1937 and not yet made public and published in the law books, covers this whole situation very clearly.

In that case the Supreme Court determined that in a case where there might be any question of competition for the deposit of public moneys between national banks and state banks, that the national banks could cover the course of procedure and take the same steps that state banks might take or that might affect state banks.

In the case cited of the City of Mount Vernon *v.* The 153
Mount Vernon Trust Company, decided by the Court of Appeals of this state, I think a careful examination of that opinion would show that the Court said that the City of Mount Vernon having received such securities for its municipal deposits of about $1,000,000 from the Mount Vernon Trust Company, that they might not be entitled to hold and hypothecate those securities and they could not secure them back without repaying to the City the amount of the deposit.

It is the same situation that might be urged in this case. In other words, the City had the securities and the bank

154 *Motion to Dismiss the Complaint.*

paid through the medium of these checks, I think no payments were ever made directly to the City, through the medium of these checks to those persons who presented the checks and received their money, the bank paying up to the amount of the City's deposits and received back its collateral, and it is apparent from this record that there were particular City funds or City deposits which were covered by the same collateral. But it is apparent that the same procedure went through with without question and the bank paid these checks and got their collateral back, and that is
155 what the Court of Appeals says they would have to do in this State. I believe that the United States decisions from its Supreme Court and the one I last cited would bear out the fact that under such conditions the First National Bank and Trust Company had that power to make this deposit of securities and were within their legal rights in getting them back and paying the City the amount of the City deposits. I think it is shown in this case that there was $535,000 worth of par value of securities held by the bank and they were returned to the City on the payment to the City of a far lesser amount than those securities represented.

In other words, it was an excellent thing for the bank
156 itself to get back those pledged securities and to pay a much lesser sum than represented the City's account. All of this indicates that the bank acted voluntarily. No question about that. The transaction was consummated and here six years after this suit is brought.

As I say, it becomes a question of fact as to whether or not those were public funds or of such a nature as to be considered as public funds and, secondly, as to whether there was any undue payment received by reason of insolvency or by reason of any other claim as to why these moneys should be refunded. In that case of McNair *v.* Knott, Judge McReynolds in determining the case with a

concurring opinion written by Mr. Justice Black, in his concurring opinion Judge McReynolds viewed the case like this where there had been this relationship between the parties and the matters had been consummated and gone through with, he said that it seemed to him that there was nothing to decide the case on without going into the question of power under Section 90.

I ask your Honor if you will read that case. Your Honor is inclined to reserve decision on this motion until we can submit those authorities. Perhaps it might help us if your Honor could give us that opportunity. 158

The Court: The evidence is closed?

Mr. Moore: Yes.

The Court: I deny your motion, with the same reservation at the close of the other cases.

Mr. McAneny: I ask the Court to make a finding in favor of the defendants.

The Court: I will withhold any action on this motion at this time.

Suppose you submit briefs on February 7th. You may send them to me at Buffalo at the Federal Courthouse.

Mr. McAneny: I assume that we will file separate briefs without the exchange of briefs and reply briefs.

Mr. Moore: Yes. 159

160 **Plaintiff's Exhibit 1.**

Treasury Department
Office of Comptroller of the Currency

TREASURY DEPARTMENT

No. 653.

Office of the Comptroller of the Currency

Washington, D. C., March 20, 1933

WHEREAS, From information on file in this bureau, I am satisfied that "The First National Bank and Trust Company of Yonkers," located in the City of Yonkers, County
161 of Westchester, and State of New York, is unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and

WHEREAS, I deem it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of the depositors and other creditors thereof:

NOW, THEREFORE, I, F. G. Awalt, Acting Comptroller of the Currency in pursuance of the power and authority vested in me by law and under the provisions of Title II, known as the "Bank Conservation Act" of an Act of Congress entitled "An Act to provide relief in the existing
162 national emergency in banking, and for other purposes," approved March 9, 1933, do hereby appoint P. W. Trudeau Conservator of "The First National Bank and Trust Company of Yonkers," with all the powers, duties and responsibilities given to or imposed upon such officer under the provisions of said Act of Congress authorizing the appointment and creating the duties of a Conservator.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twentieth day of March, A. D., 1933.

F. G. AWALT,
Acting Comptroller of the Currency

(SEAL)

(Duly certified April 15, 1933.)

Plaintiff's Exhibit 2.

TREASURY DEPARTMENT

No. 653.

Office of the Comptroller of the Currency

Washington, D. C. July 24, 1933

WHEREAS, P. W. TRUDEAU, was duly appointed and commissioned Conservator of "The First National Bank and Trust Company of Yonkers", located in the City of Yonkers, County of Westchester and State of New York, on the twentieth day of March, 1933, and whereas the said P. W. 164
Trudeau has resigned to take effect at the close of business on July 24, 1933:

NOW, THEREFORE, I, J. F. T. O'CONNOR, Comptroller of the Currency, do hereby appoint LOUIS D. ROSSIRE Conservator of "The First National Bank and Trust Company of Yonkers", to take effect at the close of business on the twenty-fourth day of July, 1933, in place of the said P. W. TRUDEAU, with all the powers, duties and responsibilties given to or imposed upon a Conservator under the provisions of Title II, known as the "Bank Conservation Act" of an Act of Congress entitled "An Act to provide relief in the existing national emergency in banking, and for other 165
purposes", approved March 9, 1933.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-fourth day of July, A. D. 1933.

Comptroller of the Currency
J. F. T. O'CONNOR

(SEAL)

(Duly certified September 9, 1933.)

166

Plaintiff's Exhibit 3.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., January 23, 1934.

WHEREAS, From information on file in this bureau, I am satisfied that "The First National Bank & Trust Company," located in the City of Yonkers, County of West-
167 chester, and State of New York is insolvent and unable to pay its just and legal debts:

NOW, THEREFORE, I, J. F. T. O'CONNOR, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Arthur E. Muth, Receiver of "The First National Bank & Trust Company of Yonkers," with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United
168 States which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-third day of January, A. D. 1934.

J. F. T. O'CONNOR
Comptroller of the Currency

(Seal)

(Duly certified May 27, 1936.)

Plaintiff's Exhibit 4.

TREASURY DEPARTMENT

No. 653

Office of the Comptroller of the Currency

Washington, D. C., November 15, 1937.

WHEREAS, Arthur E. Muth was duly appointed and commissioned Receiver of "The First National Bank & Trust Company of Yonkers," located in the City of Yonkers, County of Westchester and State of New York on the twenty-third day of January, 1934, and whereas the said Arthur E. Muth has resigned to take effect at the close of business on November 15, 1937.

NOW, THEREFORE, I, William Prentiss, Jr., Acting Comptroller of the Currency, do hereby appoint Walter F. Downey Receiver of "The First National Bank & Trust Company of Yonkers" to take effect at the close of business on the fifteenth day of November, 1937, in place of the said Arthur E. Muth, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

IN WITNESS WHEREOF, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of November, A. D., 1937.

WILLIAM PRENTISS, JR.
Acting Comptroller of the Currency.

(Seal)

(Duly certified November 16, 1937.)

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Plaintiff's Exhibit 5.

PROCLAMATION.

(SEAL OF STATE.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

Until early this morning it was my hope that it would not be necessary to interrupt the continuous operation of the banking system of New York State. The spread of hysteria and the restrictions imposed upon the banking
173 facilities of the country through measures adopted in so many states have at last placed upon the New York banks a burden so great that it has finally rendered drastic action imperative here.

Therefore, at a meeting early this morning the Clearing House Committee of the New York Clearing House, with the advice and recommendation of the Federal Reserve Bank of New York, has asked me to proclaim a banking holiday lasting until the close of business, Monday, March 6th.

I make this proclamation with complete conviction that
174 the best interests of the people of the State are being served thereby. This is a time for coolness and leadership. The people of this State and of the whole nation have shown a splendid spirit to date in meeting all the trying problems of the depression. I am confident that this spirit will be maintained.

The interval which this holiday affords should give responsible officials the necessary opportunity to consider the situation calmly and to prepare the way for an adjustment of our difficulties.

Plaintiffs' Exhibit 5. 175

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby proclaim and set apart Saturday, March 4th, and Monday, March 6th, as holidays on which all banking institutions will be closed.

GIVEN under my hand and the Privy Seal of the State at my residence, 820 Park Avenue, in the City of New York, this fourth day of March in the year of our Lord One Thousand nine hundred and thirty-three.

(SEAL)

HERBERT H. LEHMAN 176

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 4—1933

EDWARD J. FLYNN
Secretary of State

177

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Plaintiff's Exhibit 6.

PROCLAMATION.

(SEAL OF THE STATE.)

STATE OF NEW YORK.

EXECUTIVE CHAMBER.

WHEREAS, a proclamation has been issued by the President of the United States declaring a bank holiday to and including March ninth, one thousand nine hundred thirty-three:

179

NOW, THEREFORE, I, Herbert H. Lehman, Governor of the State of New York, do hereby declare that the bank holiday heretofore declared by me in the State of New York is extended to and including said March ninth, one thousand nine hundred thirty-three.

GIVEN under my hand at 820 Park Avenue in the City of New York and under the Privy Seal of the State at the Capitol in the City of Albany this sixth day of March in the year of our Lord one thousand nine hundred thirty-three.

(SEAL.)

180

HERBERT H. LEHMAN

BY THE GOVERNOR:

JOSEPH J. CANAVAN
Secretary to the Governor

State of New York
Department of State
Filed Mar 11—1933

EDWARD J. FLYNN
Secretary of State

Plaintiff's Exhibit 7.

FIRST NATIONAL BANK AND TRUST COMPANY

Yonkers, N. Y.

CONSERVATOR'S
No. A 7523

Name Saunders Trade School
TRUSTEES FUND ACC'T
Main Office

Address c/o City Treasurer
City Hall, City

Old Balance	Date	Checks in Detail	Date	Deposits	Date	New Balance
		Balance Brought Forward			Mar 25 '32	22,949.09
22,949.09			Mar 31 In	61.88	Mar 31 In	23,010.97*
23,010.97			Apr 20 '32	2,273.75	Apr 20 '32	25,284.72*
25,284.72			Apr 29 In	69.39	Apr 29 In	25,354.11*
25,354.11			May 16 '32	1,705.00	May 16 '32	27,059.11*—
27,059.11			May 28 In	73.39	May 28 In	27,132.50*—
27,132.50	Jun 7 '32	17,000.00—			Jun 7 '32	10,132.50*—
10,132.50			Jun 10 '32	990.00	Jun 10 '32	11,122.50*—
11,122.50			Jun 30 In	50.95	Jun 30 In	11,173.45*—
11,173.45			Jul 9 '32	1,636.25	Jul 9 '32	12,809.70*—
12,809.70			Jul 29 In	34.60	Jul 29 In	12,844.30*—
12,844.30			Aug 4 '32	2,585.00	Aug 4 '32	15,429.30*—
15,429.30			Aug 30 In	43.41	Aug 30 In	15,472.71*—
15,472.71			Sep 2 '32	27,011.76	Sep 2 '32	42,484.47*—
43,857.69			Sep 21 '32	1,265.00	Sep 21 '32	43,749.47*—
42,484.47*—			Sep 29 In	108.22	Sep 29 In	43,857.69*—
42,749.47			Oct 15 '32	2,273.75	Oct 15 '32	46,131.44*
46,131.44	Oct 28 '32	19,500.00—			Oct 28 '32	26,631.42*
26,631.42						26,631.42*—
26,631.42			Oct 28 '32		Oct 28 '32	26,631.44*—
26,631.44			Oct 31 In	128.04	Oct 31 In	26,759.48*
26,759.48			Nov 5 '32	1,705.00	Nov 5 '32	28,464.48*
28,464.48			Nov 30 In	82.45	Nov 30 In	28,546.93*
28,546.93			Dec 22 '32	990.00	Dec 22 '32	29,536.93*
29,536.93			Dec 30 In	82.09	Dec 30 In	29,619.02*
29,619.02			Dec 31 '32	100.83	Dec 31 '32	29,719.85*
29,719.85	Jan 3 '33	26,003.97—			Jan 3 '33	3,715.88*
3,715.88			Jan 4 '33	1,636.25	Jan 4 '33	5,352.13*
5,352.13	Jan 11 '33	3,007.97—			Jan 11 '33	2,344.16*
2,344.16			Jan 30 In	29.91	Jan 30 In	2,374.07*
2,374.07			Feb 4 '33	2,585.00	Feb 4 '33	4,959.07*
4,971.38	May 4 '33	4,971.38—	Feb 28 In	12.31	Feb 28 In	4,971.38*
4,959.07					May 4 '33	0.00*—

184

Defendant's Exhibit A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ARTHUR E. MUTH, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

185

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendants.

L. 64-75.

The attorney for the plaintiff hereby consents that the defendants' answer be deemed amended so as to include therein a paragraph as follows:

186 "Fourth-A: Denies each and every allegation contained in the paragraph of the complaint numbered 'Sixth'".

Dated, November 24, 1937.

BENJ. W. MOORE
Attorney for Plaintiff

LEONARD G. MCANENY
Attorney for Defendant

H. G. GARRITY

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Defendant's Exhibit B.

At a Special Term of the Supreme Court held in and for the County of Westchester at the County Court House in the City of White Plains, N. Y. on the 19th day of October, 1923.

Present:

HON. JOSEPH MORSCHAUSER,
Justice

188

THE CITY OF YONKERS and the BOARD OF EDUCATION IN THE CITY OF YONKERS,
Plaintiffs

against

CARL SHERMAN, as the Attorney General of the State of New York,
Defendant

189

On reading and filing the petition of THE CITY OF YONKERS and THE BOARD OF EDUCATION IN THE CITY OF YONKERS, verified the 6th day of July, 1923, praying for an Order of this Court, directing payment to The City of Yonkers of certain funds known as the Saunders Trades School Trust Fund, to be applied in reduction of the cost of maintenance to the City of Yonkers of the Saunders Trades School; and after hearing WALTER B. J. MITCHELL, of Counsel for JAMES TAYLOR LEWIS, Corporation Counsel of the City of Yonkers, in support of said petition and order, and the defendant, CARL SHERMAN, Attorney Gen-

190 *Defendant's Exhibit B.*

eral of the State of New York, having appeared in said proceeding by ROBERT P. BEYER, Esq., and after due deliberation thereon,

Now on motion of JAMES TAYLOR LEWIS, Corporation Counsel of the City of Yonkers and Counsel for the Board of Education in the City of Yonkers, it is

ORDERED that the sum of Thirty-two Thousand Dollars ($32,000.00) be paid by the City of Yonkers from the income account of the Saunders Trades School Trust Fund, in
191 reduction of the maintenance of the Saunders Trades School during the year 1921; and for the purpose of making such payment, the Comptroller and the City Treasurer of the City of Yonkers are hereby ordered and directed to draw a check in that amount, to the order of the City of Yonkers, New York, and that said check of Thirty-two Thousand Dollars ($32,000.00) be deposited to the credit of the City of Yonkers and applied to the amount stated as due and owing to the City of Yonkers by the said Saunders Trades School Fund in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers for the fiscal year 1921; and it is further

192 ORDERED that the sum of Thirty-two Thousand Dollars ($32,000) be paid by the City of Yonkers from the income account of the Saunders Trades School Trust Fund, in reduction of the maintenance of the Saunders Trades School during the year 1922; and for the purpose of making such payment, the Comptroller and the City Treasurer of the City of Yonkers, are hereby ordered and directed to draw a check in that amount, to the order of the City of Yonkers, New York, and that said check of Thirty-two thousand Dollars ($32,000.00) be deposited to the credit of The City of Yonkers, and applied to the amount stated as due and owing to the City of Yonkers by the said Saunders

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Trades School Fund in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers for the fiscal year 1922; and it is further

ORDERED that the sum of Thirty Thousand Dollars ($30,000.00) be paid by the City of Yonkers from the income account of the Saunders Trades School Trust Fund, in reduction of the maintenance of the Saunders Trades School during the year 1923; and for the purpose of making such payment, the Comptroller and the City Treasurer of the City of Yonkers are hereby ordered and directed to draw a check in that amount, to the order of The City of 194
Yonkers, New York and that said check of Thirty Thousand Dollars ($30,000.00) be deposited to the credit of the City of Yonkers, and applied to the amount stated as due and owing to The City of Yonkers by the said Saunders Trades School Fund in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers for the fiscal year 1923; and it is further

ORDERED That the Board of Estimate and Apportionment of the City of Yonkers from henceforth, in preparing its annual estimate of revenues and expenditures of the said City of Yonkers, shall include therein an estimate of the amount of income accrued or to be accrued for the said 195
fiscal year from the Saunders Trades School Trust Fund, and the Comptroller and City Treasurer of the City of Yonkers are hereby authorized and directed to pay to the City of Yonkers, New York, the amount of income thereof, in reduction of the amount of revenue as estimated in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers, as hereinbefore set forth; and in the event of the income of said Saunders Trades School Trust Fund being in excess of the amount of estimated revenue, said excess shall be applied in a manner as though the estimate of revenue had been the amount actually re-

196 *Defendant's Exhibit C.*

ceived as income from the said Saunders Trades School Trust Fund.

Enter in Westchester County,

JOSEPH MORSCHAUSER,
Justice of the Supreme Court.

Defendant's Exhibit C.

197

Resolution of Board of Estimate and Apportionment of The City of Yonkers, adopted July 10, 1929.

By Mr. Davis:—

Resolved, That the First National Bank, Yonkers National Bank and Trust Company, Yonkers Trust Company, Westchester Trust Company, the Bryn-Mawr-Nepperhan National Bank and the Central National Bank be designated as banks and trust companies for the purpose of depositing all moneys of the city received by the City Treacurer of the City of Yonkers; and the City Treasurer
198 is hereby directed to continue to procure adequate security for all moneys deposited by him in any or all of the depositories hereinbefore designated, securing and protecting the City of Yonkers against any loss of the moneys so deposited. The action of the City Treasurer in procuring interest upon the following moneys in the following accounts is hereby approved: On average daily balance of accounts known as General Accounts, two per cent (2%) to be paid semi-annually on the 30th day of June and the 31st day of December; Firemen's Pension Fund, three and one-half per cent (3½%); Police Pension Fund, three and one-half per cent (3½%); Saunders Trade Fund,

three per cent (3%). The interest on the last mentioned accounts to be paid semi-annually on the 30th day of June and the 31st day of December in each year.

Adopted by the following vote:

Ayes—Mayor Fogarty, Council President Davis, Comptroller Loehr, Corporation Counsel Laragh and City Engineer Sheridan.

(Certified February 20, 1936.)

200

Defendant's Exhibit D.

Extract from Annual Budget, City of Yonkers, 1931

ITEMIZED STATEMENT OF EXPENDITURES FOR 1931

24. Department of Education
School District, City of Yonkers
Office of Superintendent

Bureau of Trades School

201

100	Personal Service		$125,626.00
	Salaries:		
	Principal	$ 5,200.00	
	Teachers	106,405.00	
	Registrars	1,675.00	
	Firemen	2,190.00	
	Watchman	1,825.00	
	Janitors	4,980.00	
	Secretary to Principal	1,750.00	
	Mimeograph Operator	1,600.00	

202 *Defendant's Exhibit D.*

102	Wages:		$ 700.00
	Substitute Teachers	700.00	
200	Transportation Service:		45.00
201	Traveling Expenses	30.00	
204	Express and Freight	15.00	
300	Communication Service:		225.00
301	Postage	100.00	
302	Telephone	125.00	
203			
400	Other Services:		4,630.00
401	Printing	36.00	
404	Heat, Light and Power	3,548.00	
407	Repairs to Structures	546.00	
408	Repairs to Equipment	500.00	
500	Supplies:		9,800.00
501	Office, Scientific and Educational	5,000.00	
509	Heat, Light and Power	4,500.00	
510	Cleaning and Janitorial	300.00	
204			
600	Replacement of Equipment:		353.00
602	Equipment	353.00	
800	Fixed Charges and Obligations:		3,212.50
801	Insurance	3,212.50	
	Total, Bureau of Trades School		$144,590.50

205

Defendant's Exhibit E.

Extract from Annual Budget, City of Yonkers, 1932

ITEMIZED STATEMENT OF EXPENDITURES FOR 1932

* * *

24. Department of Education
School District, City of Yonkers
Office of Superintendent

* * * *

206

Bureau of Trades School

100	Personal Services:		$132,201.00
101	Salaries:		
	Principal	$ 5,300.00	
	41 Teachers	112,870.00	
	Registrars	1,675.00	
	Fireman	2,196.00	
	Watchman	1,830.00	
	Janitors	4,980.00	
	Secretary to Principal	1,750.00	
	Mimeograph Operator	1,600.00	
102	Wages:		450.00
	Substitute Teachers	450.00	
200	Transportation Service:		52.00
201	Traveling Expenses	37.00	
204	Freight and Cartage	15.00	
300	Communication Service:		250.00
301	Postage	100.00	
302	Telephone	150.00	
400	Other Services:		5,661.00

207

208 *Defendant's Exhibit F.*

401	Printing	$ 36.00	$
404	Heat, Light and Power	3,550.00	
407	Repairs to Structures	725.00	
408	Repairs to Equipment	1,350.00	
500	Supplies:		8,600.00
501	Office Supplies	5,000.00	
509	Heat, Light and Power	3,300.00	
510	Cleaning and Janitorial	300.00	
600	Replacement of Equipment		345.00
602	Equipment	345.00	
800	Fixed Charges and Obligations		1,460.00
801	Insurance	1,460.00	
	Total, Bureau of Trades School		$149,019.00

209

Defendant's Exhibit F.

Extract from Annual Budget, City of Yonkers, 1933

210

ITEMIZED STATEMENT OF EXCEPTIONS FOR 1933

* * *

26. Department of Education
School District, City of Yonkers

* * *

Bureau of Trades School

100	Personal Services:	$133,896.00

Defendant's Exhibit F. 211

101	Salaries:			
	Principal	$ 5,450.00		
	Teachers	114,426.00		
	Registrars	1,675.00		
	Fireman	2,190.00		
	Watchman	1,825.00		
	Janitors and Assistants	4,980.00		
	Secretary to Principal	1,750.00		
	Mimeograph Operators	1,600.00		
102	Wages		$ 450.00	212
	Substitute Teachers	450.00		
200	Transportation Services:		15.00	
204	Freight and Cartage	15.00		
300	Communication Service:		250.00	
301	Postage	100.00		
302	Telephone	150.00		
400	Other Services:		4,138.00	
401	Printing	38.00		
404	Heat, Light and Power	3,200.00		
407	Repairs to Structures	300.00		213
408	Repairs to Equipment	600.00		
500	Supplies:		7,350.00	
501	Office Supplies	4,100.00		
509	Heat, Light and Power	3,000.00		
510	Cleaning and Janitorial	250.00		
800	Fixed Charges and Obligations:		2,777.00	
801	Fixed Charges—Insurance	2,777.00		
	Total, Bureau of Trades School		$148,876.00	

214

Defendant's Exhibit G.

March 28, 1933

Received from the Treasurer of the City of Yonkers the following bonds:

15,000.	County of Jefferson 5s, 1947	11,250.
10,000.	State of Louisiana 4¾s—1973	7,500.
5,000.	" " 4½s—1953	4,000.
25,000.	City of Orlando, Fla. 5½s—1952	12,000.
25,000.	Canadian International Paper 6s—1949	5,250.
215 25,000.	Teaneck, N. J. 5½s—1934	17,500.
30,000.	Ohio Public Service 1953	24,000.
10,000.	South Bay Consolidated Water Co. 5s—1950	6,000.
5,000.	Laclede Gas Light Co. 5½s—35	2,400.
5,000.	New Orleans 4½s—1956	4,250.
15,000.	Butte, Montana 6s—41	11,250.
10,000.	Portsmouth, Va. 5s—54	7,700.
7,000.	Town of Huntington, L. I. 4½s—1946	5,915.
10,000.	Norfolk, Va. 4½s—1935	9,400.
216 197,000.		128,415.

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

Defendant's Exhibit G. 217

April 3d, 1933.

Received from the Treasurer of the City of Yonkers the following Bonds:

$50,000.	State of Arkansas	4½	1942	37	$ 18,500.
55,000.	Town of Lyndhurst	5½		60	33,000.
50,000.	Commonwealth of Kentucky	4½		80	40,000.
14,000.	Winston-Salem, N. C.	4¾		90	12,600.
15,000.	State of South Dakota	5		89½	13,425.
3,000.	Bay City	4		80	2,400.
5,000.	Town of Greenburgh	4½	1953	81.5	4,075.
1,000.	" " "	4½	1954	18¼	812.50
					$124,812.50

218

Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
Conservator

FIRST NATIONAL BANK & TRUST CO.,
Yonkers, N. Y.

219

April 7, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$15,000.	Norfolk, Va. 4½s—1935	@	94	14,100.
25,000.	Union, N. J. 6s—1934	@	80	20,000.
40,000.				34,100.

220 *Defendant's Exhibit G.*

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

May 4, 1933.

221 Received from the Treasurer of the City of Yonkers, the following bonds:

5,000. City of Charlotte, N. C. 4½s due 1934
12,000. Galveston, Texas 5s—1933-5
15,000. Town of Greenburgh, N. Y. 4½s—1946
2,000. Town of Huntington, L. I. 4½s—1938
2,000. " " " 4½s—1945
10,000. City of New York 4½s—1965
2,500. State of Oregon 5½s—1938
2,500. " " 5½s—1945
2,500. " " 5½s—1945
2,500. " " 5½s—1946

222 1,000. Village of Sea Cliff, N. Y. 5s—1933
25,000. State of New Mexico 6s—1935
6,000. Seattle, Wash., 5s—1934
2,000. " " 5s—1940

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Defendant's Exhibit G. 223

May 16, 1933

Received from the Treasurer of the City of Yonkers, the following bonds:

$10,000. City & County of San Francisco, school bonds 5s of 1945

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU 224
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

Yonkers, N. Y., July 20, 1933

RECEIVED, from the Treasurer of the City of Yonkers the following bonds:

$2,000 Oregon State Highway 5½% bonds due Oct. 1, 1937; Nos. 5034 and 5035 $1,000 each

1,000 Oregon State Highway 5½% bond due Oct. 1, 1938; 225
No. 5110 and

1,000 Oregon State Highway 5½% Bond due April 1938; No. 5072

said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers.

PERCIVAL TRUDEAU
FIRST NATIONAL BANK & TRUST CO.

PERCIVAL W. TRUDEAU,
Conservator

226

Defendant's Exhibit H.

(FRONT)

FINANCE DEPARTMENT, TREASURER'S OFFICE

Warrant No. —****—

No. 180

Yonkers, N. Y., May 3, 1933.

FIRST NATIONAL BANK OF YONKERS

Pay to the
— order of SAUNDERS TRADE SCHOOL FUND.....$4,971.38
227 City of Yonkers $4971 and 38 Cts.....Dollars

For Transfer check
Countersigned by
JAS. E. HUSHION
Comptroller.

G. W. KLEIN, JR.,
Treasurer.

(BACK)

SAUNDERS TRADE SCHOOL
Trust Fund Account

[Perforation]

PAID
5 4 33

228

[Endorsements]

Account of
SAUNDERS TRADE SCHOOL FUND
City of Yonkers

Pay to the Order of
Any Bank, Banker or Trust Co.
Previous Endorsements Guaranteed

MAY 3 1933
CENTRAL NATIONAL BANK
50-58 Yonkers, N. Y. 50-58
H. A. MERRITT, Cashier

Findings of Fact.

229

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

230

This cause having duly come on to be tried by the Court without a jury, and the allegations and proofs of the parties having been fully heard, I find and decide as follows:

231

1. The defendant is a municipal corporation of the second class duly organized and existing under the laws of the State of New York, acting as the testamentary trustee of "The Saunders Trade School Fund."

2. On March 4, 1933 the defendant had on deposit in The First National Bank and Trust Company of Yonkers in a checking account captioned "Saunders Trade School Trustees Fund Account" the sum of $4,971.38. The bank has since September 30, 1929 been a national banking corporation organized and existing under the laws of the United States, with its principal place of business in the

232 *Findings of Fact.*

City of Yonkers, County of Westchester and State of New York.

3. The moneys in the account on March 4, 1933 represented income from the corpus of the Saunders Trust Fund.

4. On March 4, 1933 the Governor of the State of New York proclaimed a bank holiday and the bank did not open for business that day and never afterwards reopened for regular business.

233 5. On March 6, 1933 the President of the United States proclaimed a bank holiday and on March 9, 1933 the bank holiday was extended by further proclamation of the President.

6. The Comptroller of the Currency, pursuant to statute, appointed a Conservator of the Bank on March 20, 1933 and appointed a successor Conservator on July 24, 1933. On January 23, 1934 a Receiver was appointed to liquidate the Bank and the plaintiff was appointed successor to such Receiver on November 15, 1937.

7. On July 10, 1929 the Board of Estimate and Apportionment of the City of Yonkers, consisting of the Mayor, the Common Council President, the Comptroller, the Corporation Counsel and the City Engineer, passed a resolution designating five several banks as depositories "for all moneys of the City received by the City Treasurer" and directing the City Treasurer to "continue to procure adequate security for all moneys deposited by him" in the designated depositories.

8. On September 30, 1929 three of the depositories referred to in the resolution were merged under the name The First National Bank and Trust Company of Yonkers.

Findings of Fact.

9. On March 4, 1933 the Bank had on deposit with the City as security for the aforesaid account and for city deposits bonds having a par value of $535,000.

10. The defendant withdrew the $4,971.38 in the Saunders Trade School Trustees Fund account on May 4, 1933.

11. Between March 29, 1933 and July 20, 1933 the City returned to the Bank the pledged securities to the amount of $534,000 and retained bonds of the par value of $1,000.

12. The Conservator gave receipts for the returned bonds reciting therein "said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers."

13. A first dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 13, 1937.

14. No statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

15. No statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of the City of Yonkers.

16. No applicable ordinance or local law of the City of Yonkers confers upon any bank the power to secure the deposits of the City of Yonkers.

17. That the pledge of assets by the Bank to secure the deposits in the account of the Saunders Trade School Trustees Fund was illegal and *ultra vires*.

238 *Findings of Fact.*

18. That the Bank was insolvent as of the 6th day of March, 1933 and that the rights of the general creditors of the Bank became fixed as of March 6, 1933.

19. That the payment by the Bank to the City of Yonkers, as Trustee under the last Will and Testament of Irvin Saunders, from the "Saunders Trade School Trustees Fund Account" was made with the view to the preference of the City of Yonkers, as such Trustee, over other creditors of the Bank.

239 20. That no service of any notice of claim or of intention to sue by the Bank through its Receiver was required.

21. That the payment from the Saunders Trade School Trustees Fund account to the City of Yonkers, as such Trustee, was voluntarily made under a mistake of law but is nevertheless recoverable.

22. The plaintiff is entitled to recover the sum of $2,485.69, being the difference between the amount which the City of Yonkers, as such Trustee, should have received under the 50% dividend paid by the Bank and the sum of
240 $4,971.38 paid to the defendant, together with interest and the costs of this action.

23. The plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $2,982.83 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $2,485.69 from November 3, 1937 to the date of the judgment to be entered herein.

Dated, July 18, 1938.

JOHN KNIGHT,
District Judge.

241

Defendant's Requests for Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

242

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

Comes now the above named defendant by Leonard G. McAneny, Corporation Counsel of the City of Yonkers, its attorney, and considering the same to be material to the proper presentation of this case, respectfully requests the 243 Court to make and enter the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. That The First National Bank and Trust Company of Yonkers was and is for all purposes of this action a National Banking Institution organized and existing under and by virtue of the laws of the United States of America, having its only place of business in the City of Yonkers, State of New York.

244 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

2. That the City of Yonkers was and still is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

3. That the City of Yonkers was appointed Trustee of the Saunders Trade School Fund by the Last Will and Testament of Irvin Saunders, deceased, which was admitted to probate in the Surrogate's Court, Westchester County, on the 10th day of March, 1909; that pursuant to said Will, the proceeds of the income from the trust are used for the
245 erection and maintenance of a trade school in the City of Yonkers, New York.

4. That by an order of the Supreme Court of the State of New York, County of Westchester, dated the 19th day of October, 1923, the Board of Estimate and Apportionment of the City of Yonkers was directed, in preparing its annual estimate of revenues and expenditures of the City of Yonkers for the purpose of determining the amount necessary to be raised, by taxation, which estimate covers, among other things, the authorized expenditures and anticipated revenues for the Saunders Trade School to include an esti-
246 mate of the amount of income accrued or to be accrued for the fiscal year from the Saunders Trade School Fund, and the Comptroller and City Treasurer of the City of Yonkers were authorized and directed to pay the City of Yonkers the amount of income from said fund in reduction of the amount of revenue as estimated in the annual estimate of the Board of Estimate and Apportionment of the City of Yonkers, and it was further directed that, in the event of the income of said fund being in excess of the amount of the estimated revenue, the excess should be applied in a manner as though the estimate of revenue had been the amount actually received as income from the said Saunders Trade School Trust Fund.

Defendant's Requests for Findings of Fact and Conclusions of Law. 247

5. That the income from the Saunders Trade School Trust Fund was collected by the Comptroller or City Treasurer of the City of Yonkers and deposited by the Comptroller or City Treasurer in the First National Bank and Trust Company of Yonkers in an account entitled "Saunders Trade School Trustee's Fund."

6. That checks for the withdrawal of funds in the account "Saunders Trade School Trustee's Fund" were signed by the Comptroller and by the Treasurer of the City of Yonkers. 248

7. That by a resolution adopted by the Board of Estimate and Apportionment of the City of Yonkers on July 10, 1929, certain banks were designated as depositaries for all moneys of the City deposited by the City Treasurer and the City Treasurer was directed to "continue to procure adequate security for all moneys deposited by him" in the designated depositaries.

8. That on March 4, 1933, The First National Bank and Trust Company of Yonkers, the successor by merger to three of the depositaries designated in the resolution of the Board of Estimate and Apportionment of Yonkers of July 10, 1929, had on pledge with the City of Yonkers, bonds of the par value of $535,000 which had been procured by the City Treasurer of the City of Yonkers pursuant to said resolution of July 10, 1929 from time to time prior thereto to secure, among other deposits, deposits of the defendant made by said City Treasurer in the account, "Saunders Trade School Trustee's Fund", in the sum of $4,971.38. 249

9. That on March 4, 1933, the defendant had on deposit in The First National Bank and Trust Company of Yonkers

250 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

moneys in the account "Saunders Trade School Trustee's Fund", the sum of $4,971.38.

10. That the moneys on deposit in The First National Bank and Trust Company of Yonkers in the account, "Saunders Trade School Trustee's Fund" in the sum of $4,971.38 were public funds.

11. That on Saturday, March 4, 1933, the Governor of the State of New York issued a Proclamation declaring a
251 banking holiday.

12. That the Governor's Proclamation of March 4, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

13. That The First National Bank and Trust Company was solvent on March 4, 1933.

14. That on Monday, March 6, 1933, the President of the United States issued a Proclamation declaring a banking holiday until March 9, 1933.

252

15. That the President's Proclamation of March 6, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

16. That The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

17. That on March 9, 1933, the President of the United States issued a Proclamation continuing the Proclamation of March 6, 1933, until further proclamation by the President.

Defendant's Requests for Findings of Fact and Conclusions of Law.

253

18. That the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

19. That The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

20. That on March 20, 1933, pursuant to Bank Conservation Act of March 9, 1933, the Comptroller of the Currency appointed Percival W. Trudeau Conservator of The First National Bank and Trust Company of Yonkers. 254

21. That The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

22. That from March 6, 1933, to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

23. That on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendant's releasing its lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendant's not foreclosing its said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendant that he would pay out the funds of the defendant remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds deposited with the City as security as the funds were paid out. 255

24. That on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendant, the City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank

and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for defendant's deposits, of the par value of $197,000.

25. That on May 4, 1933, The First National Bank and Trust Company of Yonkers, by and with the consent of Percival W. Trudeau, Conservator, voluntarily paid out of the funds remaining on deposit since prior to March 4, 1933, in the account "Saunders Trade School Trustee's Fund," the sum of $4,971.38 upon checks issued by the defendant and signed by the Comptroller and by the Treasurer of the City of Yonkers.

26. That the moneys paid out of the account "Saunders Trade School Trustee's Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

27. That between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendant, the City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendant's deposits, of the par value of $337,000. on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of the City of Yonkers. 259

28. That Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, gave receipts to the City of Yonkers for the securities upon their surrender, each of which receipts contained the following provision:

> "Said securities being released as pledged to secure deposits of the City of Yonkers, said release being in all respects without prejudice to the City of Yonkers." 260

29. That on July 24, 1933, Louis B. Rossire was appointed Successor Conservator by the Comptroller of the Currency; that on January 23, 1934, the Comptroller of the Currency appointed Arthur E. Muth as Receiver of The First National Bank and Trust Company of Yonkers and on November 15, 1937, the said Comptroller appointed Walter F. Downey, plaintiff herein successor Receiver.

30. That on December 16, 1933, a first dividend of 40 per cent. and on November 3, 1937, a second dividend of 10 per cent. were made available to unsecured depositors of The First National Bank and Trust Company of Yonkers. 261

31. That the defendant was a secured depositor to the extent of deposits in the account "Saunders Trade School Trustee's Fund" in the sum of $4,971.38.

32. That the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with the City of Yonkers as security for the deposits of the defendant.

262 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

33. That no claim was ever filed with the City of Yonkers or any officer thereof for the claim alleged in the complaint herein.

34. That no notice of claim and no notice of intention to sue was ever filed with the City of Yonkers or any officer thereof with respect to the claim alleged in the complaint herein.

35. That The First National Bank and Trust Company
263 of Yonkers was solvent at all times prior to January 23, 1934.

36. That all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendant out of the account "Saunders Trade School Trustee's Fund" were paid while said bank was solvent.

37. That no demand was ever made upon the defendant, the City of Yonkers, its officers or employees for the return of any of the money sued for herein.

264 38. That the Treasurer of the City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

39. That the acts found to have been done by the City of Yonkers were done on behalf of and as agent for the defendant.

CONCLUSIONS OF LAW.

1. That the defendant is entitled to judgment dismissing the complaint with costs.

Defendant's Requests for Findings of Fact and Conclusions of Law. 265

2. That the City of Yonkers was and is a political subdivision of the State of New York, and was and is a city of the Second Class under Chapter 55 of the Laws of 1909 of New York as amended.

3. That the funds deposited by the defendant in the First National Bank and Trust Company of Yonkers in account "Saunders Trade School Trustee's Fund", in the sum of $4,971.38 were public funds.

4. That the Proclamation of the Governor of New York 266
of March 4, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

5. That the Proclamation of the President of the United States of March 6, 1933, declaring a bank holiday did not create a presumption that The First National Bank and Trust Company of Yonkers was insolvent.

6. That the Proclamation of the President of the United States of March 9, 1933, declaring a bank holiday did not create a presumption that The First National Bank 267
and Trust Company of Yonkers was insolvent.

7. That the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

8. That the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

268 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

9. That solvency is presumed until the contrary is proved.

10. That The First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

11. That the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

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12. That the plaintiff is not entitled to recover deposits of the defendant paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

13. That the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

14. That the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendant

270 prior to January 23, 1934.

15. That a conservator of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

16. That a conservator of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

17. That a receiver of a national bank appointed by the Comptroller of the Currency is the agent of the Comptroller.

Defendant's Requests for Findings of Fact and Conclusions of Law.

271

18. That a receiver of a national bank appointed by the Comptroller of the Currency is not an officer of the Court.

19. That the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

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20. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant was based upon a good and valid consideration.

21. That the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant constituted an accord and satisfaction.

22. That the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

273

23. That National Banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

24. That the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant is determined by the laws of New York, the place of making.

274 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

25. That the defendant was entitled to a preference in the payment of its funds upon liquidation of The First National Bank and Trust Company of Yonkers.

26. That under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

275 27. That The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendant.

28. That The First National Bank and Trust Company of Yonkers' depositing assets with the City of Yonkers as security for the defendant's deposits of public funds was lawful.

29. That the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among
276 other deposits, deposits by the defendant in the account, "Saunders Trade School Trustee's Fund" in the sum of $4,971.38 was lawful.

30. That the defendant was a secured depositor of The First National Bank and Trust Company of Yonkers.

31. That if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with the City of Yonkers should serve as security for all of said City's deposits was beyond the powers of the said Bank, the rights and obligations of the plaintiff and defend-

ant arising therefrom are determined by the laws of the State of New York.

32. That in order to repossess itself of the assets, given to secure the deposits of the defendant, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendant.

33. That the payments of deposits on May 4, 1933, to the defendant by the Conservator of The First National 278
Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

34. That the defendant was a creditor of The First National Bank and Trust Company of Yonkers.

35. That the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness. 279

36. That the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City of Yonkers as security for the deposits of the defendant.

37. That this action was not commenced within the time limited by law.

38. That the City of Yonkers is prohibited by law from paying the claim alleged in the complaint.

280 *Defendant's Requests for Findings of Fact and Conclusions of Law.*

39. That the City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

40. That the City of Yonkers is not liable in a civil action for damages or injuries to person or property, or invasion of personal or property rights, of any name or
281 nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the City, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall
282 be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

In the event of a denial by the Court of defendant's requests for the foregoing findings of fact and conclusions of law or any part thereof, defendant respectfully requests the Court to grant an exception or exceptions to defendant.

Dated: Yonkers, N. Y., July ...., 1938.

Respectfully submitted,

LEONARD G. MCANENY,
Attorney for defendant.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.

283

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

v.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

284

L. 64-75.

Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

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LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., and MORRIS L. ROSENWASSER and HAROLD T. GARRITY, of Counsel, for Defendant.

KNIGHT, District Judge.

The Court finds with respect to the Defendant's Findings of Fact and concludes as to the Conclusions of Law submitted in this case as follows:

286 *Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.*

FINDINGS OF FACT.

1. Found.
2. Found.
3. Found.
4. Found.
5. Found.
6. Found.
7. Found.

287

8. Found.
9. Found.
10. Refused.
11. Found.
12. Found.
13. Refused.
14. Found.
15. Refused.
16. Refused.
17. Found.

288

18. Refused.
19. Refused.
20. Found.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
25. Found.
26. Refused.
27. Refused.
28. Found.

Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law. 289

29. Found.
30. Found.
31. Refused.
32. Refused.
33. Found.
34. Found.
35. Refused.
36. Refused.
37. Found

290

38. Refused.
39. Refused.

CONCLUSIONS OF LAW.

1. Refused.
2. Found.
3. Refused.
4. Found.
5. Found.
6. Found.

291

7. Refused.
8. Refused.
9. Refused.
10. Refused.
11. Refused.
12. Refused.
13. Refused.
14. Refused.
15. Found.
16. Found.

292 *Rulings on Defendant's Requests for Findings of Fact and Conclusions of Law.*

17. Found.
18. Found.
19. Refused.
20. Refused.
21. Refused.
22. Refused.
23. Refused.
24. Refused.
293 25. Refused.
26. Refused.
27. Refused.
28. Refused.
29. Refused.
30. Refused.
31. Refused.
32. Refused.
33. Refused.
34. Found.
35. Refused.
294 36. Refused.
37. Refused.
38. Refused.
39. Refused.
40. Refused.

July 18, 1938.

JOHN KNIGHT,
United States District Judge.

Filed July 29, 1938.

Defendant's Exceptions.

295

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER E. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

296

Exceptions are allowed the defendant as noted in the stenographic minutes of the trial herein, and to the findings numbered 4, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 contained in the findings of the court, dated July 18, 1938, and to the denial of findings of fact numbered 10, 13, 15, 16, 18, 19, 21, 22, 23, 24, 26, 27, 31, 32, 35, 36, 38 and 39 and to the denial of conclusions of law numbered 1, 3, 7, 8, 9, 10, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39 and 40, as requested by the defendant, this 27th day of October, 1938.

297

JOHN KNIGHT,
U. S. D. J.

And the defendant prays that its bill of exceptions may be allowed, settled and signed.

LEONARD G. MCANENY,
Attorney for Defendant.

298 *Order Settling Bill of Exceptions.*

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the bill of exceptions herein contains all the material facts, proceedings, rulings and exceptions thereto occurring upon the trial of this cause and not heretofore a part of the record herein and that the exhibits set forth or referred to constitute all the exhibits offered in evidence at the said trial and that the same may be settled and allowed in the form proposed and submitted and ordered on file as a bill of exceptions herein.

299 Dated, Yonkers, New York, November 17, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff,

LEONARD G. McANENY,
Attorney for Defendant.

Order Settling Bill of Exceptions.

It appearing that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of 300 this cause, and not heretofore a part of the record herein, including all evidence adduced at the said trial, and that the exhibits set forth in the foregoing bill of exceptions constitute all of the exhibits offered in evidence in the said trial.

I hereby settle and allow the foregoing bill of exceptions as a full, true, and correct bill of exceptions in this cause and order the same on file, and further order the clerk of this Court to transmit said entire bill of exceptions to the Circuit Court of Appeals for the Second Circuit.

Dated this 18th day of November, 1938.

JOHN KNIGHT,
U. S. D. J.

301

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75

302

Appearances:

BENJAMIN W. MOORE, Yonkers, N. Y., for Plaintiff.

LEONARD G. MCANENY, Corporation Counsel of Yonkers, N. Y., MORRIS L. ROSENWASSER, and HAROLD T. GARRITY, of Counsel, for Defendant.

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Hon. JOHN KNIGHT, District Judge:

On March 4, 1933, the Defendant as Trustee of "The Saunders Trade School Fund" had on deposit in the First National Bank and Trust Company of Yonkers, New York, hereinafter referred to as Bank, in a checking account captioned: "Saunders Trade School Trustees Fund Account" the sum of $4,971.38. This fund was deposited with the Bank in accordance with resolution adopted by the Board

of Estimate and Apportionment of the City of Yonkers on July 10, 1929, designating the First National Bank and Trust Company as one of the depositaries for "all moneys of the City received by the City Treasurer of the City of Yonkers." This money was withdrawn on May 4, 1933. This deposit was secured by bonds deposited with it by the Bank, and, after withdrawal of said deposits, the pledged securities were returned to the Bank. The moneys so deposited represented income from the corpus of the Saunders Trust Fund. It is claimed by the defendant that this deposit was a public fund. Whether it was a public or private fund makes no difference with the determination herein. Whether public or private, pledging of securities therefor by the Bank was illegal and *ultra vires*. Save and excepting the question of the nature of the deposit, the material facts are the same as those found in *Downey* v. *City of Yonkers*, this day decided by me. For the reasons therein assigned, Plaintiff is entitled to judgment in the sum of $2,485.69, being the difference between the amount which the Plaintiff should have received as a fifty percent. dividend from the Bank and the amount paid by the Bank to the City on account of the deposit aforesaid, with interest from April, 1936.

Findings of Fact and Conclusions of Law may be submitted, and, when signed, made a part of the decision herein.

June 8, 1938.

JOHN KNIGHT,
United States District Judge.

307

Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

308

The issues in this action having been regularly brought on for trial before Hon. John Knight, District Judge, on the 5th day of January, 1938 without a jury, and the plaintiff having appeared by Benjamin W. Moore, his attorney, and Milton L. Romm, of counsel, and the defendant having 309
appeared by Leonard G. McAneny, Esq., Corporation Counsel, and Morris L. Rosenwasser, Esq. and Harold T. Garrity, Esq., Assistant Corporation Counsels, and the court having heard the allegations and proofs of the parties and having filed its opinion, dated June 8, 1938, and its findings of fact and conclusions of law, dated July 18, 1938, directing judgment as hereinafter stated, and the costs of the plaintiff having been duly taxed at $50.93.

Now, on motion of Benjamin W. Moore, attorney for the plaintiff, it is

310 *Opinion of Court on Applicability of Rules of Civil Procedure.*

ADJUDGED that the plaintiff, Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, do recover of the defendant, The City of Yonkers, as Trustee under the last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", the sum of $2,485.69 together with interest thereon in the sum of $382.93 and the sum of $50.93 costs as taxed, making in all the sum of $2,919.55 and that the plaintiff have execution therefor against the defendant, The City of Yonkers, as Trustee under the last Will and Testament of
311 Irvin Saunders, of "The Saunders Trade School Fund". Judgment signed this 5th day of August, 1938.

CHARLES WEISER,
Clerk.

Opinion of Court on Applicability of Rules of Civil Procedure.

The motion in each of these cases for an order limiting
312 exceptions herein pursuant to new Rule 46 is denied. Irrespective of the question of whether new Rule 86 applies to actions in which final judgment had been entered prior to the effective date of the new rules, it is my view that the application of the new rules would not be feasible and work injustice to the defendant.

An order may be submitted to conform with this communication.

JOHN KNIGHT,
U. S. D. J.

313

Order Denying Motion to Apply New Rules on Appeal.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court House thereof in the Borough of Manhattan, City of New York, on the 18th day of October, 1938.

Present:

Hon. JOHN KNIGHT,
District Judge.

314

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

315

The defendants having moved this Court for an order invoking the application of the Federal Rules of Civil Procedure to this action with respect to Rule 46 eliminating the necessity for exceptions and Rule 73 eliminating the necessity of assignments of error, and said motion having been submitted by Leonard G. McAneny, Esq., attorney for the defendants, and by Benjamin W. Moore, attorney for the plaintiff, by Milton L. Romm, of counsel,

Now, on reading and filing the notice of motion dated the 20th day of September, 1938, and the affidavit of Leon-

316 *Petition and Order Allowing Appeal.*

ard G. McAneny, thereto annexed, verified the 20th day of September, 1938, in support of said motion, and the affidavit of Benjamin W. Moore, verified the 3rd day of October, 1938, in opposition thereto, it is

ORDERED, that the motion be and it hereby is in all respects denied.

JOHN KNIGHT,
District Judge.

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317 **Petition and Order Allowing Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

318 THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

To the Honorable William Bondy, Judge of the District Court, sitting for the Southern District of New York.

Now comes the defendant-appellant, The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

by Leonard G. McAneny, its attorney, and feeling itself aggrieved by the judgment of this Court entered on the 5th day of August, 1938, hereby prays that an appeal may be allowed to it from said judgment, to the United States Circuit Court of Appeals for the Second Circuit, and that citation issue, and, in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that an order be made fixing the amount of the bond to be given by defendant for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenti- 320
cated, shall be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated: Yonkers, New York, October 28th, 1938

LEONARD G. MCANENY
Corporation Counsel
Attorney for defendant-appellant

The above appeal is hereby allowed.

Dated: New York, N. Y. October 31st, 1938

321

WM. BONDY,
U. S. D. J.

A bond for costs in the usual form was duly approved and filed in the office of the Clerk of the Court on October 31, 1938.

322 **Assignments of Error and Prayer for Reversal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

against

323 THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

Now Comes the defendant-appellant, The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", by Leonard G. McAneny, Corporation Counsel, its attor-
324 ney, and submits, presents and files its assignments of error complained of and says:

That in the records and proceedings of the Honorable United States District Court for the Southern District of New York, in a certain action entitled "Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, New York, Plaintiff, against The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," Defendant, and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

Assignments of Error and Prayer for Reversal. 325

1. The said court erred in finding that the bank did not open for business on March 4, 1933 and never afterwards reopened for regular business.

2. The said court erred in finding that no statute of the State of New York confers upon state banks the general power to pledge assets to secure deposits of political subdivisions of the state.

3. The said court erred in finding that no statute of the State of New York confers upon state banks the specific power to pledge assets to secure deposits of The City of Yonkers. 326

4. The said court erred in finding that no applicable ordinance or local law of The City of Yonkers confers upon any bank the power to secure deposits of The City of Yonkers.

5. The said court erred in finding that the pledge of assets by the bank to secure the deposits in the account of the Saunders Trade School Trustee's Fund was illegal and *ultra vires*.

327

6. The said court erred in finding that the bank was insolvent as of the 6th day of March, 1933 and that the rights of general creditors of the bank became fixed as of March 6, 1933.

7. The said court erred in finding that the payment by the bank to The City of Yonkers, as Trustee under the Last Will and Testament of Iryin Saunders from the "Saunders Trade Schol Trustee's Fund" account was made with the view to the preference of The City of Yonkers as such Trustee over other creditors of the bank.

328 *Assignments of Error and Prayer for Reversal.*

8. The said court erred in finding that no service of any notice of claim or of intention to sue by the bank through its Receiver was required.

9. The said court erred in finding that the payment from the Saunders Trade School Trustee's Account to The City of Yonkers as such Trustee, was voluntarily made under a mistake of law, but is, nevertheless, recoverable.

10. The said court erred in finding that the plaintiff is
329 entitled to recover the sum of $2,485.69 being the difference between the amount which The City of Yonkers, as such Trustee, should have received under the 50% dividend paid by the bank and the sum of $4,971.38 paid to the defendant together with interest and the costs of this action.

11. The said court erred in finding that the plaintiff is entitled to recover interest at the rate of 6% per annum on the sum of $2,982.83 from May 1, 1936 to November 2, 1937 and interest at the same rate on the sum of $2,485.69 from November 3, 1937 to the date of the judgment to be entered herein.

330 12. The said court erred in failing to find that the moneys on deposit in The First National Bank and Trust Company of Yonkers in the account, "Saunders Trade School Trustee's Fund" in the sum of $4,971.38 were public funds.

13. The said court erred in failing to find that The First National Bank and Trust Company was solvent on March 4, 1933.

14. The said court erred in failing to find that the President's Proclamation of March 6, 1933, did not declare

that The First National Bank and Trust Company of Yonkers was insolvent.

15. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 6, 1933.

16. The said court erred in failing to find that the President's Proclamation of March 9, 1933, did not declare that The First National Bank and Trust Company of Yonkers was insolvent.

332

17. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 9, 1933.

18. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent on March 20, 1933.

19. The said court erred in failing to find that from March 6, 1933 to March 20, 1933, The First National Bank and Trust Company of Yonkers was under the management and control of its own officers.

333

20. The said court erred in failing to find that on March 28, 1933, Percival W. Trudeau, in consideration (1) of the defendant's releasing its lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with the City, (2) of the defendant's not foreclosing its said lien in the State Courts, (3) of the City's surrendering the said assets so deposited, agreed with the defendant that he would pay out the funds of the defendant remaining on deposit with The First National Bank and Trust Company provided the City would return the bonds

334 *Assignments of Error and Prayer for Reversal.*

deposited with the City as security as the funds were paid out.

21. The said court erred in failing to find that on March 28, 1933, pursuant to the said agreement between Percival W. Trudeau and the defendant, the City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for
335 defendant's deposits, of the par value of $197,000.

22. The said court erred in failing to find that the moneys paid out of the account "Saunders Trade School Trustee's Fund" by The First National Bank and Trust Company of Yonkers were payments made in the regular course of business of such bank.

23. The said court erred in failing to find that between March 29, 1933, and January 23, 1934, pursuant to the said agreement between Percival W. Trudeau and the defendant, The City of Yonkers in consideration of said agreement and in reliance thereon surrendered to The First National
336 Bank and Trust Company of Yonkers, by delivery to said Percival W. Trudeau, Conservator, bonds, held by the said City as security for the defendant's deposits, of the par value of $337,000 on the dates and in the amounts as follows:

April 3, 1933	$193,000
April 7, 1933	40,000
May 4, 1933	90,000
May 16, 1933	10,000
July 20, 1933	4,000

leaving $1,000 of said bonds in the hands of The City of Yonkers.

24. The said court erred in failing to find that the defendant was a secured depositor to the extent of deposits in the account "Saunders Trade School Trustee's Fund" in the sum of $4,971.38.

25. The said court erred in failing to find that the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company deposited with The City of Yonkers as security for the 338
deposits of the defendant.

26. The said court erred in failing to find that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

27. The said court erred in failing to find that all of the moneys paid by The First National Bank and Trust Company of Yonkers to the defendant out of the account "Saunders Trade School Trustee's Fund" were paid while said bank was solvent.

339

28. The said court erred in failing to find that the Treasurer of The City of Yonkers is and was a person receiving and depositing moneys belonging to the State of New York.

29. The said court erred in failing to find that the acts found to have been done by The City of Yonkers were done on behalf of and as agent for the defendant.

30. The said court erred in failing to make the conclusion of law that the defendant is entitled to judgment dismissing the complaint with costs.

340 *Assignments of Error and Prayer for Reversal.*

31. The said court erred in failing to make the conclusion of law that the funds deposited by the defendant in The First National Bank and Trust Company of Yonkers in account "Saunders Trade School Trustee's Fund", in the sum of $4,971.38 were public funds.

32. The said court erred in failing to make the conclusion of law that the appointment of Percival W. Trudeau as Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said
341 bank was insolvent.

33. The said court erred in failing to make the conclusion of law that the appointment of Louis D. Rossire, as successor Conservator of The First National Bank and Trust Company of Yonkers did not create a presumption that said bank was insolvent.

34. The said court erred in failing to make the conclusion of law that solvency is presumed until the contrary is proved.

35. The said court erred in failing to make the con-
342 clusion of law that the First National Bank and Trust Company of Yonkers is presumed to have been solvent until the contrary is proved.

36. The said court erred in failing to make the conclusion of law that the plaintiff failed to overcome the presumption that The First National Bank and Trust Company of Yonkers was solvent at all times prior to January 23, 1934.

37. The said court erred in failing to make the conclusion of law that the plaintiff is not entitled to recover

deposits of the defendant paid out by The First National Bank and Trust Company of Yonkers prior to its insolvency.

38. The said court erred in failing to make the conclusion of law that the rights of general creditors of The First National Bank and Trust Company of Yonkers became fixed upon the insolvency of said bank.

39. The said court erred in failing to make the conclusion of law that the plaintiff has failed to prove a cause of action for the return of moneys paid by The First National Bank and Trust Company of Yonkers to the defendant prior to January 23, 1934. 344

40. The said court erred in failing to make the conclusion of law that the negotiation of a settlement of claims against The First National Bank and Trust Company of Yonkers, including the payment of deposits to obtain the release of securities pledged to secure the same was within the scope of the authority of Percival W. Trudeau, as Conservator of said bank.

41. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant was based upon a good and valid consideration. 345

42. The said court erred in failing to make the conclusion of law that the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant constituted an accord and satisfaction.

43. The said court erred in failing to make the conclusion of law that the plaintiff is bound by the agreements or contracts made in the collection of the assets of The First National Bank and Trust Company of Yonkers by the agents of the Comptroller of the Currency.

44. The said court erred in failing to make the conclusion of law that national banks are subject to the laws of the State of New York in their dealings with persons, firms or corporations within the State of New York.

45. The said court erred in failing to make the conclusion of law that the validity, force and effect of the agreement of March 28, 1933, between Percival W. Trudeau, as Conservator of The First National Bank and Trust Company of Yonkers, and the defendant is determined by the laws of New York, the place of making.

46. The said court erred in failing to make the conclusion of law that the defendant was entitled to a preference in the payment of its funds upon liquidation of The First National Bank and Trust Company of Yonkers.

47. The said court erred in failing to make the conclusion of law that under the law of the State of New York state banking institutions therein are authorized to give security for the safekeeping and prompt payment of deposits of the state, and of cities and of all other political subdivisions thereof, in such banks.

48. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company was authorized by law to give security for the safekeeping and prompt payment of public funds deposited with it by the defendant.

49. The said court erred in failing to make the conclusion of law that The First National Bank and Trust Company of Yonkers' deposit of assets with The City of Yonkers, as security for the defendant's deposits of public funds, was lawful.

50. The said court erred in failing to make the conclusion of law that the pledge of assets by The First National Bank and Trust Company of Yonkers to secure, among other deposits, deposits by the defendant in the account, "Saunders Trade School Trustee's Fund" in the sum of 350
$4,971.38 was lawful.

51. The said court erred in failing to make the conclusion of law that the defendant was a secured depositor of The First National Bank and Trust Company of Yonkers.

52. The said court erred in failing to make the conclusion of law that if the agreement that the bonds deposited by The First National Bank and Trust Company of Yonkers with The City of Yonkers should serve as security for all of said city's deposits was beyond the powers of the said bank, the rights and obligations of the plaintiff and defendant arising therefrom are determined by the laws of 351
the State of New York.

53. The said court erred in failing to make the conclusion of law that in order to repossess itself of the assets given to secure the deposits of the defendant, The First National Bank and Trust Company of Yonkers, its Conservators and Receivers, were required to pay in full said deposits to the defendant.

54. The said court erred in failing to make the conclusion of law that the payments of deposits on May 4, 1933, to the defendant by the Conservator of The First National

Bank and Trust Company of Yonkers were "permitted" payments allowed under the authority of the Proclamation of the President of March 6, 1933, the executive order of March 10, 1933, and Regulation No. 10 of the Secretary of the Treasury.

55. The said court erred in failing to make the conclusion of law that the law of the State of New York gives a creditor a lien upon assets deposited with such creditor as security for the indebtedness.

353 56. The said court erred in failing to make the conclusion of law that the defendant had a good, valid and subsisting lien upon the assets of The First National Bank and Trust Company of Yonkers deposited with The City of Yonkers as security for the deposits of the defendant.

57. The said court erred in failing to make the conclusion of law that this action was not commenced within the time limited by law.

58. The said court erred in failing to make the conclusion of law that The City of Yonkers is prohibited by law
354 from paying the claim alleged in the complaint.

59. The said court erred in failing to make the conclusion of law that The City of Yonkers is prohibited by law from paying any claims unless a claim therefor, verified by or on behalf of the claimant, and approved by the head of the department or officer whose action gave rise or origin to the claim shall have been presented to the Comptroller, and shall have been audited and allowed by him.

60. The said court erred in failing to make the conclusion of law that The City of Yonkers is not liable in a civil

action for damages or injuries to person or property, or invasion of personal or property rights, of any name or nature whatsoever, arising at law or in equity, alleged to have been caused or sustained by or because of any omission of duty, wrongful act, fault, neglect, misfeasance or negligence on the part of the city, or any of its agents, officers or employees, unless a claim therefor in writing, verified by the oath of the claimant, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be presented 356
to the common council and served upon the Mayor or City Clerk and notice of intention to commence an action thereon be served upon the Corporation Counsel, nor unless an action shall be commenced thereon within one year after the happening of such accident or injury or the occurrence of such act, omission, fault or neglect.

61. The said Court erred in overruling the defendant's objection to the introduction in evidence of Plaintiff's Exhibit 1.

62. The said Court erred in overruling the defendant's objection to the introduction in evidence of Plaintiff's 357
Exhibit 2.

63. The said Court erred in denying the defendant's motion to dismiss the complaint made at the end of the plaintiff's case.

64. The said Court erred in denying the defendant's motion to dismiss the complaint made at the conclusion of the whole case.

358 *Assignments of Error and Prayer for Reversal.*

WHEREFORE, said defendant-appellant respectfully prays:

(1) That the judgment entered in said action be reversed.

(2) That judgment be entered in favor of the defendant with costs in all courts.

(3) That the lower court be directed to enter judgment in favor of the defendant with costs in all courts.

359

(4) That said defendant-appellant have such other, further or different relief as may be just.

Dated: October 28th, 1938.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant-Appellant.

360

Citation.

361

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

L. 64-75.

362

To Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, New York, Appellee, and Benjamin W. Moore, his attorney, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit held at Federal Courthouse, in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Southern District of New York, at New York, N. Y., wherein The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," is appellant and Walter F. Downey, as Receiver of the First National Bank and Trust Company of Yonkers, New York, is appellee, to show cause, if any there be, why the judgment entered herein on the 5th day of August, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

363

WITNESS, the Honorable William Bondy, Judge of the District Court of the United States, sitting for the Southern District of New York, on this 31st day of October, 1938.

WM. BONDY,
U. S. D. J.

364

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,

Plaintiff,

against

365

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-75.

To Charles Weiser, Clerk of the United States District Court, Southern District of New York.

Sir:

366 Notice is hereby given that The City of Yonkers, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund", defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on August 5, 1938.

Dated: New York, N. Y.
October 31, 1938

LEONARD G. MCANENY
Corporation Counsel, Attorney
for Defendant,
Office & P. O. Address
City Hall
Yonkers, New York.

Stipulation and Order Extending Time to File Record. 367

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff;

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-175. 368

WHEREAS, an appeal was allowed the defendant herein on the 31st day of October, 1938, and

WHEREAS, the time of the said defendant to docket this case and file the transcript of record on appeal herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit will expire on November 30, 1938, now 369 therefore,

IT IS STIPULATED AND AGREED, by and between the parties hereto that the time of the defendant to docket this case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938 and an order to this effect may be entered by either party without notice.

Dated: Yonkers, New York, November 23, 1938.

BENJ. W. MOORE,
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant.

70 *Stipulation and Order Extending Time to File Record.*

On reading and filing the foregoing stipulation, it is

ORDERED, that the time of the defendant to docket the above entitled case and file the transcript of record thereof with the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended to December 15, 1938.

Dated: New York, N. Y., November 23, 1938.

CHARLES WEISER,
71 Clerk, U. S. District Court,
Southern District of New York

72

Stipulation and Order Settling Record.

373

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation,

Plaintiff,

against

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Defendant.

L. 64-175.

374

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true copy of the transcript of the record of the District Court in the above entitled matter as agreed upon by the parties.

Dated: Yonkers, New York, November 29, 1938.

375

BENJ. W. MOORE
Attorney for Plaintiff.

LEONARD G. MCANENY,
Corporation Counsel,
Attorney for Defendant.

On reading the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated: New York, N. Y., December 3rd, 1938.

VINCENT L. LEIBELL,
U. S. D. J.

376

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York,
Plaintiff,

377 *against*

L. 64-75

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"
Defendant.

I, Charles Weiser, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District
378 Court in the above entitled matter.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York this 5th day of December, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundredth and sixty-third year.

CHARLES WEISER,
Clerk.

(SEAL)

379

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

THE CITY OF YONKERS,

Defendant-Appellant.

No. 230.

380

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Defendants-Appellants.

No. 231.

381

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,

Plaintiff-Appellee,

against

JOSEPH F. LOEHR, Mayor; JAMES J. HUSHION, Comptroller, and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Defendants-Appellants.

No. 232.

382 *Opinion.*

WALTER F. DOWNEY, Receiver of The First National Bank & Trust Company of Yonkers, in liquidation,
Plaintiff-Appellee,
against
THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders of "The Saunders Trade School Fund",
Defendant-Appellant.

No. 233.

383 Before:

L. HAND, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

From judgments in the several actions above-named that the Receiver of the First National Bank & Trust Company of Yonkers in Liquidation recover of the respective defendants therein fifty per cent. of certain moneys paid
384 out by the Bank between March 8, 1933 and January 23, 1934, inclusive, on checks drawn on behalf of the various defendants, the latter appeal. Affirmed.

LEONARD G. MCANENY, Corporation Counsel, for Defendants-Appellants; LEONARD G. MCANENY, E. J. DIMOCK, MORRIS L. ROSENWASSER, J. DONALD RAWLINGS and HAROLD T. GARRITY, Counsel.

BENJAMIN W. MOORE, Attorney for Plaintiff-Appellee; BENJAMIN W. MOORE and MILTON L. ROMM, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The legal principles applicable to Action No. 230 against the City of Yonkers are determinative of the issues in the other three cases which need not, therefore, be separately discussed.

This is an action by the receiver of The First National Bank & Trust Company of Yonkers (herein called the Bank) against The City of Yonkers (herein called the City) to recover fifty per cent. of certain money paid out by the Bank, between March 8, 1933, and January 23, 1934, inclusive, on the checks of the City. Since September 30, 1929, the Bank has been a national banking corporation organized and existing under the laws of the United States and the City a municipal corporation organized and existing by virtue of the laws of the State of New York. 386

On March 4, 1933 the City had funds on deposit in checking accounts in the Bank as follows:

(1) Treasurer of the City	$275,105.53
(2) City of Yonkers	1,502.84
(3) Nepperhan Sewer Fund of City of Yonkers	621.88

387

On March 4, 1933, the Governor of the State of New York proclaimed a bank holiday, and on March 6, 1933 the President of the United States proclaimed a bank holiday which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date. The Bank never reopened for regular business after March 4, 1933 but operated under restrictions imposed by the Secretary of the Treasury until a Conservator was appointed. On March 20, 1933 the Comptroller of the Currency appointed a Conservator of the Bank and on Janu-

ary 23, 1934, appointed a receiver in liquidation. A dividend of 40% was made available to the general depositors of the Bank on December 16, 1933 and a second dividend of 10% was made available on November 3, 1937.

On March 4, 1933, the City held various bonds having a par value of $535,000 which had been delivered to it by the Bank as security for the above three accounts, among others. These bonds, to the amount at par of $534,000, were later returned in connection with withdrawals from the accounts.

By a series of withdrawals beginning on March 8, 1933 and ending on January 23, 1934, the City withdrew almost all of the balance in each of the three accounts as follows:

1. Account with Treasurer of City		$275,105.53
Withdrawals:		
March 8 to March 19	$ 89,226.06	
March 20 to March 27	67,735.99	
March 28 on	118,016.99	
Total		274,979.04
2. Account with City of Yonkers		$ 1,502.84
Withdrawals:		
May 23 to July 21, 1933		1,502.84
3. Account with Sewer Fund		$ 621.88
Withdrawals:		
May 4, 1933		621.88

The complainant seeks to recover fifty per cent. of the above withdrawals on the ground that they constituted an unlawful preference within Sections 91 and 194, U. S. C. A., of the National Bank Act.

If the pledge of bonds to secure the deposits was authorized by the National Bank Act it is clear that the City had a valid lien on the bonds to the extent of its deposits and this action by the receiver must fail. *Lewis* v. *Fidelity Deposit*, 292 U. S. 559; *McNair* v. *Knott*, 302 U. S. 369. It is likewise settled that national banks have no implied power to pledge assets to secure either private or 392
public deposits, *Texas & Pac.* v. *Pottorff*, 291 U. S. 245; *Marion* v. *Sneeden*, 291 U. S. 262. Express authority for the pledge made in this case depends upon whether the requirements of the Act of June 25, 1930, 12 U. S. C. A., §90, have been met. That section provides that:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." 393

The purpose of the Act of June 25, 1930 was to equalize the positions of national and state banks in competing for deposits, and is in line with a long series of acts, beginning in 1864, designed to apply the policy of equalization: *Lewis* v. *Fidelity Co.*, 292 U. S. 559, at 564-65.

It is conceded that there was no express statutory authority in New York authorizing state banks to give security for these deposits during the times involved. In the absence of express enabling statutes state banks in New York are not authorized to pledge assets to secure either private or public deposits, and it is the duty of the

Superintendent of Banks to compel them to recover any assets so pledged upon the return of the deposits when demanded. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, at 187-88. As was said by Judge Finch in his opinion in *City of Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, 406: "No question remains that this pledge by the defendant securing the deposit (of public money) was *ultra vires* as to both parties." So far as the Act of June 25, 1930, may be thought to require an authorization of state banks to make pledges as a prerequisite for pledges by national banks it does not apply here.

But the law of New York is that pledges by state banks to secure deposits, even though *ultra vires*, may not be set aside until the deposits have been repaid in full, whether or not insolvency has intervened. *State Bank of Commerce* v. *Stone*, 261 N. Y. 175; *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400. The parties concede that the law of New York with respect to the effect of an *ultra vires* pledge does not bring the pledges here within the Act of June 25, 1930. The policy of the statute would appear to lead to the same conclusion. The Act was designed to equalize competition for public deposits and it does not appear to give national banks authority to do what the state banks are forbidden to do and what the State Superintendent of Banks is under a duty to undo. The banks of the State could not give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition. The use of the term "authorized" in the Act accords with this view; a pledge which is "*ultra vires*" cannot be said to be "authorized".

The City argues, however, that the pledge made by the national bank in this case, even though not authorized and outside the scope of its charter powers, should be given the same effect as State law gives to similar pledges by State banks. Such a result would be contrary to the result reached in *Texas & Pac. Ry.* v. *Pottorff*, 291 U. S. 245, and

Marion v. *Sneeden*, 291 U. S. 262, in which the Court held that a national bank might recover assets which had been pledged to secure deposits even though the depositor would not be paid in full because of supervening insolvency of the bank.

The City says that these decisions are not controlling because in neither did it appear that the law of the State where the transaction occurred gave any different effect to an *ultra vires* pledge by a bank than that given under the federal law. Nevertheless both decisions make it plain, that, unless the right to pledge is expressly granted by a federal statute, a pledge to secure deposits in national banks is wholly unauthorized and, as Justice Brandeis said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255: 398
"To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. . . . This policy of equal treatment was held to preclude, in case of a national bank, even the preference under §3466 of the Revised Statutes which otherwise is accorded to the United States when its debtor becomes insolvent. *Cook County National Bank* v. *United States*, 107 U. S. 445. The effect of a pledge is to withdraw for the benefit of one depositor 399
part of the fund to which all look for protection."

It is true that in spite of the foregoing general policy of the Act, Congress has seen fit to permit national banks to give security to depositors "of the same kind as is authorized by the law of the State", but it seems unreasonable to suppose that the general policy of the National Bank Act to prevent preferences is to be so limited as to permit hypothecations of assets that do not strictly fall within the statutory exceptions to a sound general rule requiring equal distribution of the assets of insolvent banks among all depositors. As we have already said the words

"authorized by the law of the State" plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts. Under the law of New York, as it existed at the time the Bank became insolvent, there can be no doubt that the pledges were unauthorized. In *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, and *Mt. Vernon* v. *Mt. Vernon Trust Co.*, 270 N. Y. 400, the Court of Appeals held that enforcement of the law prohibiting pledges to secure deposits lay with the State Superintendent of Banks who, under his statutory powers, should be alert to prevent such pledges
401 and to undo them prior to the occurrence of insolvency. The Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, evidently felt that the supervisory power of the Comptroller of the Currency was not enough to insure adequate enforcement of the policy to prevent pledges but that they should be treated by the courts as wholly void. The question of the right of a national bank to pledge its assets to secure depositors and the effect to be given to such a pledge when once made are both clearly matters of national concern. The rule in some of the states (including New York) that a bank is estopped to rescind a pledge to a
402 depositor until he is paid in full is directly in the face of the policy attributed to the National Bank Act in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262. In this connection see *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372; *California Bank* v. *Kennedy*, 167 U. S. 362.

The rationale of the two cases cited from the New York Court of Appeals appears to be that a banking corporation organized under the laws of the State has certain actual powers outside the powers authorized by its charter and that its exercise of such *ultra vires* powers may create an estoppel not only against the corporation itself but also

against its general creditors. The measure of the powers of a national bank, on the other hand, is the statutory grant and powers not conferred by Congress are denied. The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362. The decision of the Supreme Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 260-61, is based upon a holding that a national bank cannot exercise powers not granted so as to erect an estoppel against the general creditors for whose benefit the 404
limitation of powers was imposed. See *Concord First National Bank* v. *Hawkins*, 174 U. S. 364. If the problem here be viewed as depending upon the powers which a national bank can exercise it seems clear that the extent of its powers must be determined by an interpretation of the federal statute in the light of the policy therein expressed and that views of state courts on the powers of local corporations have no relevance except as Congress expressly makes them applicable. For the foregoing reasons the plaintiff receiver who represents the general creditors is not estopped to set aside the pledge that was made in this case.

405 The holding in *Willing* v. *Binenstock*, 302 U. S. 272, and *Scott* v. *Armstrong*, 146 U. S. 499, 510, that a setoff, allowed under the common law of a State to an insolvent bank is not objectionable as a preference, does not militate against avoiding the pledges here. The transactions in those cases were ones which the banks were authorized to make and the state law was followed because it did not conflict with the policy of the Bank Act. It is one thing to sanction a general rule of law which allows a depositor to set off his deposit against his indebtedness, it is another thing to sanction a preference based on a transaction forbidden by the Act.

406 *Opinion.*

While a national bank in some cases may be under a duty to return benefits it has received as the result of an *ultra vires* transaction (see *First National Bank* v. *Mott Iron Works*, 258 U. S. 240; *Citizens National Bank* v. *Appleton*, 216 U. S. 196), the rule if applicable here would not help the defendant since it would not be entitled to a preference against the other depositors of the insolvent bank in the absence of tracing a specific *res*. *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 261; *cf. Rankin* v. *Emigh*, 218 U. S. 27. It is well settled that the distribution
407 of the assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded. *Old Company's Lehigh, Inc.* v. *Meeker*, 294 U. S. 227; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216; *Davis* v. *Elmire Savings Bank*, 161 U. S. 275.

The City claims that the payments to it prior to the Conservatorship were not made "after the commission of an act of insolvency, or in contemplation thereof * * * with a view to the preference of one creditor to another * * *". The Bank was closed from March 4, 1933
408 to March 6, 1933 under proclamations by the Governor of New York and the President of the United States. Later it was permitted to operate under restrictions imposed by the Secretary of the Treasury. On March 20 a Conservator was appointed with the powers of a receiver as provided in 12 U. S. C. A., §203. On January 23, 1934, the Comptroller of the Currency on a finding of insolvency appointed a receiver. The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the pay-

ments were in violation of 12 U. S. C. A., §91. See *Dehne* v. *Mine Safety Appliance Co.*, 94 F. (2d) 956 (C. C. A. 3); *cf. Kullman* v. *Wooley*, 83 F. (2d) 129 (C. C. A. 5); *Willing* v. *Evetoff*, 94 F. (2d) 344 (C. C. A. 3); *Hardee* v. *Washington Loan & Trust Co.*, 91 F. (2d) 314 (App. D. C.).

The payments made by the Conservator were recoverable on still another theory because made out of the assets of an insolvent under a mistake of law. *LaParr* v. *City of Rockford, Ill.*, 100 F. (2d) 564 (C. C. A. 7); *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 152 (App. D. C.), aff'd. 297 U. S. 383. For the foregoing reasons the judgments in the four cases on appeal are affirmed. 410

411

412 **Order for Mandate.**

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of August, one thousand nine hundred and thirty-nine.

Present:

413 Hon. LEARNED HAND,
Hon. AUGUSTUS N. HAND,
Hon. HARRIE B. CHASE,
Circuit Judges.

WALTER F. DOWNEY, Receiver, etc.,
Plaintiff-Appellee,
vs.
THE CITY OF YONKERS, as Trustee, etc.,
Defendant-Appellant.
No. 233.

414

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

IT IS FURTHER ORDERED that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

WALTER F. DOWNEY, Receiver, etc.,

vs.

CITY OF YONKERS, as Trustee, etc.

ORDER FOR MANDATE.

United States Circuit of Appeals,
Second Circuit,
Filed Aug. 22, 1939,
D. E. ROBERTS, Clerk.

418

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 139, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

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WALTER F. DOWNEY, Receiver, etc.,

Plaintiff-Appellee,

against

THE CITY OF YONKERS, as Trustee, etc.,

Defendant-Appellant.

as the same remain of record and on file in my office.

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IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of September, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly-certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.